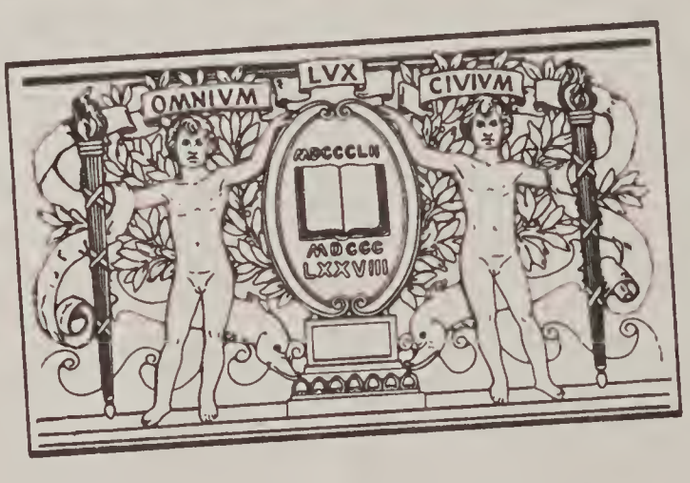

BOSTON PUBLIC LIBRARY

O'Connell, Archbishop Murray and the Board of Charitable Bequests

An all but forgotten incident in the Ecclesiastical History of Dublin in the 19th Century

BY THE

MOST REV. WILLIAM J. WALSH, D.D.,

ARCHBISHOP OF DUBLIN,

A Commissioner of Charitable Donations and Bequests in Ireland

BROWNE AND NOLAN, LIMITED

DUBLIN . BELFAST . CORK . WATERFORD

CONTENTS

INTRODUCTORY

A CONSIDERABLE part of the contents of this pamphlet was originally published, but only in outline, in two articles on the Board of Charitable Donations and Bequests in Ireland, which appeared in the numbers of the *Irish Ecclesiastical Record* for October and November, 1895.

The chief object of those articles was to vindicate the memory of the Most Rev. Dr. Murray, who was Archbishop of Dublin when the Board was established in 1844. Dr. Murray was invited to accept a place on the Board when it was being formed. He did so, regarding it as a matter of duty to accept the responsible position thus offered to him. This brought down upon him a storm of obloquy and even of insult, the natural result of a number of speeches delivered by O'Connell at public meetings in Dublin and elsewhere.

Especially in his speeches at the meetings in Dublin, delivered as they were before large and enthusiastic gatherings, O'Connell was unsparing in his denunciations of the new Board and of the duties it had been set up to discharge. These he described as duties which no Catholic, and, particularly, no Catholic bishop, could take it upon himself to discharge without showing that he had but little regard for the interests of religion.

They were duties, he said, that were destructive of the liberty of the Catholic Church in Ireland: they were in conflict with the canonical rights of the Bishops throughout the country: they were dishonouring to those who would have anything to do with the discharge of them,—since, as he repeatedly assured his hearers, prominent amongst those duties was the disgraceful one of taking away the property of the Regular Clergy in Ireland.

When the articles in the *Ecclesiastical Record,* written in vindication of the action of Dr. Murray throughout a trying time, were published, they were considered not devoid of interest by those who would naturally be expected to be interested in such matters. And it was suggested to me by legal and other friends,—amongst others, by the two distinguished members of the Bar who kindly read for me the proofs of the articles,—that the subject was deserving of a much more extended treatment.

For many years it seemed unlikely that I could find leisure to act upon the suggestion. But a recent prolonged, yet happily not too trying, illness, together with the hardly less prolonged period of recovery that followed it, whilst obliging me to withdraw for the time from the discharge of many of the active duties of my office, left me free to take up any light work that would be in the nature rather of occupation than of labour.

I took in hand, then, the revision and expansion of the two articles that I had written twenty years before.

This did not involve very much more than the arrangement of a number of notes taken at intervals during those twenty years, and the collection of further materials, furnished in abundance by the Dublin newspapers of the years 1844 and 1845.

This pamphlet is the result.

✠ W. J. W.

Archbishop's House,
Dublin.
Feast of St. Laurence O'Toole, 1916.

NOTE

The following key to the abbreviations that occur in the references to the Reports or other legal works referred to in the course of this pamphlet, may be found useful:—

Amb. 614	Ambler's Reports, Chancery, page 614.[1]
2. Beav.	Beavan's Reports, Rolls Court, vol. ii.
6 Ch. D.	Law Reports, Chancery Division, vol. vi.
10 Cl. & F.	Clark & Finnelly's Reports, House of Lords, vol. x.
Co. Litt.	Coke upon Littleton: the First Part of the Institutes of the Laws of England.
Cr. & Ph.	Craig and Phillips, Chancery Reports.
1 Dr. & War.	Drury & Warren, Chancery Reports, Ireland, vol. i.
10 Ir. Jur. (N.S.)	*The Irish Jurist* (New Series), vol. x.
[1901] 1 I.R.	*The Irish Reports*, 1901, vol. i.
3 Kay & J.	Kay & Johnson's Chancery Reports, vol. iii.
2 Myl. & K.	Mylne & Keene's Chancery Reports, vol. ii.
2 Eden.	Eden's Chancery Reports, vol. ii.
2 Inst.	Coke's Second Part of the Institutes of the Laws of England.
1 P. & M.	Pollock & Maitland, *The History of English Law before the time of Edward I*, vol. i.

[1] In all cases, the last figure in the reference indicates the page of the work referred to.

When there is more than one volume in a work, the volume referred to is indicated by a number prefixed to the title of the work, as may be seen in several instances in the text above.

O'CONNELL, ARCHBISHOP MURRAY, AND THE BOARD OF CHARITABLE DONATIONS AND BEQUESTS.

The body of Commissioners incorporated under the title of 'The Commissioners of Charitable Donations and Bequests in Ireland,' and commonly known in Ireland as the Bequests Board, was established by an Act of Parliament passed in 1844.[1]

Under the provisions of the Act of 1844, and of two later Acts, passed, respectively, in 1867,[2] and in 1871,[3] the Commissioners are entrusted with a number of important functions in connection with the administration of charitable funds in Ireland.

Like all other public bodies, the Bequests Board has had from time to time to bear its share of criticism. Under this head, however, it has but little to complain of. Enjoying an almost complete immunity from criticism of the acrimonious order, it is enabled to discharge its varied functions in an atmosphere of practically unruffled calm. In this respect, its career has been wholly different from what could have been anticipated seventy-two years ago, when the introduction of the Government Bill for the establishment of this Board gave rise to a stormy agitation, partly political, partly religious, memorable even amongst those by which Ireland has from time to time been convulsed in modern days.

I.—*Seventy-two years ago: the Bequests Bill introduced; a fiercely hostile reception in Ireland.*

It is only by referring to the newspapers of the time that anything like an adequate idea can now be formed

[1] 7 & 8 Vict. c. 97. [2] 30 & 31 Vict. c. 54.
[3] 34 & 35 Vict. c. 102.

of the state of feeling that prevailed in Ireland, from the introduction into Parliament of the Bill for the establishment of the Bequests Board, in June, 1844, throughout the remainder of that year, and for some months of the following year, 1845.

For one reason or another, it was deemed by O'Connell, and by all who sympathised with him in his political views, an object of high political importance to hinder the Bill, if possible, from being passed into law. Then, the Bill having been passed into law, the next point aimed at was to make the enactment a dead letter, by rendering impossible the formation of the Board of Commissioners by whom it was to be administered.

This result could, it was hoped, be achieved if, by means of a violent agitation throughout Ireland, the new Act could, on religious grounds, be made an object of general execration amongst Catholics. Popular feeling, it was calculated, would thus be so violently aroused as to deter any Catholic of representative position from accepting the office of Commissioner under the Act. But the Act provided that at least five of the Commissioners should be Catholics,—or, in the formal phraseology of the Act of Parliament, should be 'persons professing the Roman Catholic religion.' A failure, then, on the part of the Government to find five suitable Catholics would, it was inferred, involve the break-down of the measure, a result that could not fail to cover with discredit the English Ministers who had made this measure an important part of their Irish policy.

The agitation, while it lasted, was of fierce intensity. It owed its origin and its main strength to a series of sensational statements, widely circulated through the newspapers, as to the legal effects of the Government measure. In these statements, most of which came before the public on the professional authority of O'Connell, the provisions of the new Act were represented as utterly destructive of the rights, and even of the liberty, of the Catholic Church in Ireland.

The line of tactics thus taken by the opponents of the measure was skilfully chosen. O'Connell was very generally regarded in Ireland, not only as an advocate of unrivalled skill, but as one of the foremost lawyers of the day. Those who were not themselves lawyers could not but recognise that they would run a serious risk of error in what was undoubtedly a matter of grave importance, if they took it upon themselves to disregard the deliberate and repeated statements of such an authority as to the ruinous legal consequences of the new enactment in its bearing upon Catholic interests.

A day or two after the introduction of the Bill into Parliament, the attack upon it was opened by the leading popular newspapers in Dublin. From day to day, from week to week, the fire was vigorously kept up. Articles were written, letters were published, filled with violent denunciations of the Bill. It was an 'insidious,' a 'nefarious,' an 'execrable,' a 'cursed,' a 'treacherous,' an 'atrocious,' an 'infernal,' a 'hellish,' measure. The fact that it had been introduced in 'that branch of the legislature, which best keeps the secrets of the prison-house,'—in other words, the House of Lords,—was, in itself, 'damning evidence of treachery.'

The Bill thus denounced had been introduced into Parliament by the Government of the day,—Sir Robert Peel being then Prime Minister. It was introduced as a measure of relief. And it had at all events the semblance of a remedial measure, notably in its provisions for the removal of one particularly irritating feature of the old Protestant ascendancy,—the Bequests Board that was then in existence, a body all but exclusively Protestant in its constitution.

That Board was one of the most formidable of the minor strongholds of the old ascendancy. It had been established in 1800, by an Act passed in the last session of the Irish Parliament,[1] and, as

[1] 40 Geo. III. c. 75 (Ir.).

a matter of course, it had been established as an exclusively Protestant body. It consisted of fifty members, all *ex-officio*,—the occupants either of important positions in the Irish Protestant Established Church, or of certain judicial and other posts which, under the one-sided legislation of the time, could be held only by Protestants.

The following were its members: The four Archbishops, and the eighteen Bishops, of the Irish Established Church[1]; the Protestant Dean of St. Patrick's, Dublin; the Protestant Archdeacon of Dublin; the Protestant Vicar-General of Dublin; the Protestant Incumbents of all the parishes in the City of Dublin and its Liberties; the Provost of Trinity College; the Lord Chancellor of Ireland; the twelve Judges of the three Superior Courts of Queen's Bench, Common Pleas, and Exchequer; and the Judge of the Prerogative Court.[2] Furthermore, a quorum of the Board could not be constituted unless there was present at least one of the Archbishops or Bishops!

The object of the Irish Parliament in constituting in 1800 this body of Commissioners to supervise the administration of charitable gifts, was to hinder the concealment or misapplication of funds intended for charitable purposes.

An Act 'for the better Discovery of Charitable Donations and Bequests,' had already been passed by the Irish Parliament in 1763.[3] That Act recited that 'the pious intentions of many charitable persons' were 'frequently defeated by the concealment or misapplication' of charitable donations or bequests. And, as a check upon such fraudulent practices, it enacted that, within three months of probate of a will being obtained, particulars of every charitable donation or

[1] Until 1834, these were the numbers of the Archbishops and Bishops of the Irish Protestant Established Church. See Appendix A.

[2] On the Prerogative Court, no longer extant, see Appendix B.

[3] 3 Geo. III. c. 18 (Ir.).

bequest contained in it were to be published, three times successively, in *The Dublin Gazette.* The passing of this Act of 1763 was followed up in 1764 by the appointment of a Standing Committee of the Irish House of Lords, charged with the general supervision and protection of charities in Ireland.

After reciting the appointment of that Committee, and the results of its watchfulness over charitable gifts, the Act of 1800 went on to appoint a Board of Commissioners, as a corporate body with perpetual succession,[1] and it empowered the Commissioners—

> To sue . . . for the recovery of every charitable donation or bequest which may or shall be withheld, concealed, or misapplied.

It also directed the Commissioners—

> To apply the same, when recovered, *according to the intentions of the donors.*

All this looked harmless enough. But there was added a provision notably extending the powers of the Commissioners thus far declared.

For they were empowered—

> In case it be *inexpedient,* unlawful, or impracticable, to apply the same strictly according to the directions and intentions of the donors, then to apply the same to such charitable and pious purposes *as they shall judge to be nearest and most conformable to the directions and intentions of the donors.*

Thus there was conferred upon that Board a power of *cy-près* application[2] of charitable funds, extending even to cases in which it might be considered by the Commissioners merely 'inexpedient' to apply the funds as directed by the donor. And they were at liberty to apply those funds to such charitable and pious purposes *as they should judge* to be nearest and most conformable to the directions of the donor.

[1] On 'corporations' and 'corporate bodies,' see Appendix C.
[2] On *cy-près* application, see Appendix D.

This, manifestly, was a power so elastic in its nature as to be altogether indefensible, in view especially of the fact that, whilst the Board was constituted as an exclusively Protestant body, there were amongst the charitable gifts to be controlled by it gifts intended for Catholic, as well as those intended for Protestant, purposes.

Besides, on more than one ground, the Board and its proceedings were the subjects of severe criticism. As time went on, its procedure was loudly complained of as being extravagantly costly.[1] There were also complaints about the manner in which the unduly elastic *cy-près* powers entrusted to it were exercised. But, in addition to these grounds of objection in detail, there was the fundamental grievance that this body,—which had to do with Catholic no less than with Protestant charities, and which frequently, if not invariably, was officially represented in Court when the charitable bequests of Catholic testators were in question,—was not only a Protestant body, but was altogether controlled by the dignitaries and other clergy of the Established Church.

For, as we have seen, the number of the clergy on the Board was more than double that of the lay members,[2] and, in addition, the working of the Board was, to a large extent, left in the hands of the clergy, owing to the exceedingly rare attendances of the Judges who were members of the Board.[3]

From a Parliamentary return, issued in 1844, it appears that the Board then consisted of fifty members, —thirty-two of these being Protestant ecclesiastics, and seventeen, Protestant laymen,—so that, amongst the fifty members, there were then forty-nine Protestants and but one Catholic! This was Judge Ball, who,

[1] For some account of the peculiar way in which the business of the Bequests Board of 1800-1844 was transacted, see Appendix E.

[2] See p. 4.

[3] See Hamilton, *The Law relating to Charities in Ireland* (Dublin, 1881), p. 220.

fifteen years after the passing of the Catholic 'Emancipation' Act, was the only Catholic amongst the twelve Judges of the three Superior Courts of Common Law in Ireland.

A few years previously, in February, 1840, the Catholic Bishops of Ireland, assembled in General Meeting, had addressed a Memorial to Lord Morpeth, then Chief Secretary for Ireland in the Melbourne administration, complaining of the constitution of the Board, and praying that it should be 'rendered more useful and popular by the introduction to it of Roman Catholic Commissioners.'

Nothing, however, was done for the removal of the one-sided character of the Board by the Ministry then in power. But, early in the Parliamentary session of 1844, it was announced on behalf of the Government of Sir Robert Peel that a Bill was to be introduced in that session with the view of placing the administration of charitable funds in Ireland on a more satisfactory basis. This was the Bill that was destined to be so fiercely opposed in Ireland.

That the Bill of 1844, in so far as it doomed to extinction the one-sided Board set up in 1800, was a measure of relief to the Catholics of Ireland could not be questioned. But this, proclaimed its opponents, was but a cloak for the treachery of its authors. If their duplicity had not been equal to the malignity of their persecuting spirit against the Church of the Irish people, they would, it was said, have given to the Bill its only true title: 'A Bill for the Subjugation to the State of the Catholic Church in Ireland.' [1]

In one noteworthy letter, addressed through the public press to the Prime Minister, the Bill was described as—

Surpassing in its odious provisions *the worst enactments*

[1] See the Dublin popular newspapers of the time, *passim*.

of penal times, and developing a *maturity of wicked refinement in legislation*, which *the more clumsy artificers of the anti-Catholic code* would in vain attempt to rival.[1]

This was from the Archbishop of Tuam, Dr. MacHale, who throughout took a leading part in the opposition to the Bill, as was indeed but a natural consequence of his deep-rooted conviction that the Bill, in its legal aspect, was everything that O'Connell proclaimed it to be.

With characteristic vigour, his Grace protested against 'the attempt to impose upon the Catholics of Ireland' by 'the insidious proffer' of nominating some 'discreet and proper' Catholics[2] as members of the Board :—

> What those proper and discreet persons may be, we may learn from the history of *every apostate, in religion as well as in politics*. . . .
> Of such 'proper and discreet persons' you might possibly find a few among the trading politicians of Ireland, *and perchance among the ecclesiastics too.*

In further reference to the same topic, the Archbishop continued :—

> Nothing shall ever reconcile us to such a Bill. It is my firm conviction that *no ecclesiastic, possessed of the least regard for the interests of religion*, would ever consent to

[1] See the Archbishop of Tuam's letter in *The Freeman's Journal* of July 4, 1844, or in *The Pilot* of the following day.

The editor of *The Pilot*, a Mr. Barrett, was a personal friend of O'Connell's, as may be seen from many of O'Connell's letters to him in W. J. Fitzpatrick's *Correspondence of Daniel O'Connell* (London, 1888).

It may be mentioned here that *The Pilot* was published only three times a week. Thus it was not unfrequently a day late in the publication of reports, as also of matter that was sent in the first instance to other newspapers.

On the other hand, *The Pilot* would naturally have a decided advantage in the case of personal communications from O'Connell.

For some interesting and curious details regarding the editor of *The Pilot* see W. J. Fitzpatrick's *Correspondence of Daniel O'Connell*, vol. i. pp. 498-501 ; vol. ii. (various passages, for which see the Index to that volume). See also C. Gavan Duffy's *My Life in Two Hemispheres*, vol. ii. pp. 133, 134.

[2] The Archbishop's reference is to the provision in the Bequests Act respecting the ten persons, other than the *ex-officio* members, to be appointed Commissioners by the Crown. See p. 11 (1).

become an agent in working *a Bill of such infernal machinery*; and, if I could suppose such dereliction of duty to be possible, that person who should be guilty of it would infallibly *earn the reprobation of all the Catholics of the Christian world.*

Various modifications were made in the Bill as it was passing through Parliament. But these were in no way effective in allaying the stormy agitation that was set on foot in Ireland on its introduction. Indeed, the general tone of the speeches, letters, and newspaper articles was that,—in so far as there was any difference worth taking account of,—the last state of the Bill was far worse than the first.

One or two illustrations of this may be of interest. In *The Freeman's Journal* of July 26th, 1844, the Bill having then assumed the shape in which a few days afterwards it passed into law, we read :—

> It has been said that this amended bill was, at all events, an improvement of the first bill; *we utterly and solemnly deny that it is so.*
>
> Nay, the amended bill makes what was in the original *much worse*, and has *additional matter of aggravation and insult to the people of Ireland.*[1]

And not many days afterwards, in the same newspaper, the public were gravely assured that, by the enactment of this 'atrocious' Bill, Sir Robert Peel, the Prime Minister of the day, had—

> Obtained *a right to nominate pretenders to the Catholic parishes and Catholic bishoprics of Ireland* (!)[2]

It may not be out of place to add another instance of this wild recklessness in criticism. On the 12th of August, *The Pilot* gave its view of the Bill, or rather of the Act, as it then was, as follows :—

> We have been at pains to examine this Bill. We have compared it as now virtually law with what it was when first introduced, and can state without hesitation or possibility of mistake, if that was bad,—which it was,—

[1] *The Freeman's Journal*, July 26th, 1844.
[2] Ibid., August 8th, 1844.

this, which professed to amend it, has made it *infinitely worse*.

The Bill, as at first introduced, left the trusteeship or management of bequests by the Commissioners *optional* with the bequestor (*sic*). The Bill, as improved (?), makes it MANDATORY.[1] Every Catholic desirous to make a bequest [2] in future is *deprived of the privilege of choosing his own trustees* (!) . . . He is constrained to have his charitable intentions and liberality consigned to, vested in, and managed in all its details, by a Commissioner appointed by the enemies of his religion, and essentially hostile to the objects of his charitable and pious purposes.[3]

The article concluded with the strong declaration: 'there is but one mode of meeting this outrage now that it is law,—for *the Catholic bishops to refuse as one man to administer such a law*.' And the writer asked: 'Can it be possible that even one of that venerable body shall be found so weak or blind as to be inveigled by its treacherous pretences?' The answer, of course, was an indignant negative: 'The Hierarchy of Ireland,'—the readers of *The Pilot* were assured,—'will neither be corrupted nor deceived.'

II.—*The main provisions of the Bequests Act of* 1844.

It will be well here to bear in mind that this Act, which was so fiercely assailed in 1844 as 'surpassing in its odious provisions the worst enactments of penal times,' is still in force, and that its 'provisions,' and its 'machinery,' then denounced as 'odious' and 'infernal,' have ever since been, as they are to-day, in active operation!

The meetings of the Commissioners appointed to administer the Act have been held, without intermission, throughout the seventy-one years that have

[1] The capitals are in the newspaper article as printed.

[2] Of course the Bill, from the beginning, had reference to 'charitable' and 'pious' bequests only. And it applied to Protestants as well as to Catholics.

[3] *The Pilot*, August 12th, 1844.

now elapsed since the first meeting of the Board in January, 1845. Between twenty and thirty meetings have been held each year. At each meeting, as a rule, important business is transacted. Yet, since the year 1845, down to the present day, it has not even been suggested that there is anything, either in the powers with which the Commissioners are invested, or in the manner in which those powers have been exercised, that can be regarded as encroaching in the slightest degree upon the sphere of ecclesiastical jurisdiction, or as interfering in any way with the liberty or the rights of the Church.

The chief provisions of the Act of 1844, when it had passed into law, were as follows :—

(1) The old Board of Charitable Bequests was abolished, and was replaced by a Board of thirteen members. Three of these—the Master of the Rolls, the Chief Baron of the Exchequer, and the Judge of the Prerogative Court [1]—were *ex-officio* members. The ten other members were to be 'proper and discreet persons' appointed by the Crown, and of these ten members, 'five, and not more than five,' were to be 'persons professing the Roman Catholic religion.'

(2) All the property that had, from time to time, been vested in the former Commissioners,—which then amounted to about £175,000, with rents, annuities, and rent-charges, amounting in yearly value to about £2,000,—was transferred to the new Commissioners.

(3) In its 6th section the Act makes special provision for the consideration by the Commissioners of two important classes of cases. These are cases in which there may arise some question concerning the usages and discipline of the 'Church of Rome,' on

[1] The Prerogative Court (see p. 4, n. 2) came to an end in 1858. As to the resulting changes in the constitution of the Bequests Board, see Appendixes B. and F.

the one hand, or of the Irish Protestant Episcopalian Church or of a body of Protestant Nonconformists, on the other.

Under this section,[1] every such case is to be referred to one of two Committees :—to a Committee consisting of those Commissioners who are Protestants, if there is question of the usages and discipline either of the Irish Protestant Episcopalian Church or of any body of Protestant Nonconformists ; or to a Committee consisting of those Commissioners who are members of 'the Church of Rome,' if there is question of the usages and discipline of that Church.

If, then, 'by reason of reference to . . . any usage of any such Church or Body, or any district or division in use according to the discipline of any such Church or Body,' the object of a donation, devise, or bequest is not defined with legal certainty in the deed or will creating the trust, the Committee to which the case has been referred is to certify to the Commissioners as a body,—

(*a*) Who is, according to the uses and intendment of such Church or Body, the person for the time being intended to take the benefit of the donation, devise, or bequest ; or

(*b*) Other particular facts concerning the usages or discipline of such Church or Body, necessary to be known for the due administration of the trust according to the true intent and meaning of the donor.

The advantage of having matters that fall under either of these heads dealt with by a Committee composed of those Commissioners who belong to the religion directly concerned in the due administration of

[1] One need not be an expert in English law to see that this 6th section of the Act is very far from being a model of drafting.

In his first professional Opinion on the Act (as to which see pp. 18-23), O'Connell, referring to this section, said : 'It is difficult to state the full effect of the section ; it is drawn up in a most jumbled, untechnical, and confused manner. It is about as bad and as indistinct a mode of legislating as it has happened to me in my long experience to see.'

the trust, rather than by the Board as a whole, is obvious.[1]

This arrangement secures that matters of a religious nature shall be dealt with by those Commissioners who have,—or who, if they have not, are in a position to obtain,—the information without which the trust cannot be administered in accordance with the intentions of the donor.

The section goes on to provide that,—the Committee having certified as aforesaid,—'the Commissioners shall receive every such certificate as evidence of the facts certified, and shall give effect to such donation, devise, or bequest accordingly.'[2]

The section ends with the important proviso, that—

Nothing herein contained shall be construed to limit or affect the jurisdiction of any court of law or equity.

(4) Under the 12th section of the Act, the Commissioners are empowered,—subject to the sanction of the Attorney-General or Solicitor-General,—to sue for the recovery of charitable gifts or bequests, 'withheld, concealed, or misapplied': the property, when recovered, is to be applied by them 'to charitable and pious uses, *according to the intention of the donor or donors.*' Under this section the Commissioners are furthermore authorised to deduct out of the gift so recovered, 'all the costs, charges, and expenses which they shall have been put to in the suing for and recovery of the same.'

(5) As regards certain specified classes of Catholic charitable purposes of a permanent character, a

[1] The Board, at the beginning, was composed of three *ex-officio* members, all of whom were Protestants, and ten others, five of whom were Catholics and five were Protestants.

Thus the constitution of the Board at first was eight Protestants and five Catholics. On the past and present constitution of the Board see Appendix F.

[2] In the section, this last direction to the Commissioners is qualified by the words 'so far as the same may be lawfully executed according to the provisions of this Act.' But this refers only to the restriction that is mentioned in the 15th, and to that which is enacted in the 16th section. See p. 14 (7).

provision is made in the 15th section of the Act, enabling property assigned to such purposes to be held in trust in perpetuity by the Commissioners as a corporate body, thus removing the necessity of having recourse to the more or less unsatisfactory, and at times costly, machinery of private trusteeships.

This special method of securing a charitable trust to be held by the Commissioners in perpetuity was made available if the property was to be held :—

(*a*) In trust for building, enlarging, upholding, or furnishing any chapel or place of religious worship of persons professing the Roman Catholic religion; or,

(*b*) In trust for any Archbishop or Bishop, or other person in Holy Orders of the Church of Rome, *officiating in any district*, or *having pastoral superintendence of any congregation* of persons professing the Roman Catholic religion, *and for those who shall from time to time so officiate or shall succeed to the same pastoral superintendence* ; or for building a residence for his and their use.

(6) In the same 15th section of the Act a Proviso was inserted to the effect that nothing contained in the Act was to be construed as rendering lawful any donation, devise, or bequest, to, or in favour of, any religious Order prohibited by the Act of 1829 known as the Catholic 'Emancipation' Act, or any donation, devise, or bequest, to, or in favour of, any member or members thereof.

(7) We now reach the great blot upon the Act. This is a provision in the 16th section, as follows :

After the commencement of this Act, no donation, devise, or bequest, for pious or charitable uses in Ireland, shall be valid to create or convey any estate in lands, tenements, or hereditaments, for such uses, unless *the deed, will, or other instrument containing the same* shall be *duly executed three calendar months at least before the death* of the person executing the same.

And unless every such *deed or instrument, not being a will*, shall be *duly registered* in the Office for Registering Deeds in the city of Dublin *within three calendar months after the execution thereof.*

(8) The only other section of the Act that need be mentioned here is the 22nd. This contains the important enactment that, with one specified exception, nothing contained in the Act shall be taken to make void[1] or render unlawful 'any donation, devise, or bequest *which but for this Act would be lawful.*'

The one exception thus referred to is the requirement in the 16th section, just now mentioned, as to the time within which a deed, will, or other instrument containing a donation, devise, or bequest, for pious or charitable uses must be executed or registered as a condition of the validity of any such donation, bequest, or devise therein contained.

These are the chief provisions of the Bequests Act of 1844. The other provisions of the Act regard matters of procedure or of detail.

Up to a point, the Act was unquestionably a useful one, but the powers that it conferred on the Commissioners left many wants unprovided for. Its shortcomings in this respect have, however, been made good to a considerable extent by two amending Acts, passed, respectively, in 1867 and 1871.[2]

In some other respects also the Act fell short of being a thoroughly satisfactory one. It was sadly marred by the provisions of its 16th section, which introduced into our Irish legislation an indefensible restriction based upon an English Act of George II, incorrectly designated the Georgian 'Mortmain' Act.[3]

But whatever may be the defects of the Act of 1844, it has long since come to be recognised that none of these can be regarded as giving ground for the attitude of violent hostility taken up towards

[1] The words of the Act are 'to *avoid*,' this being the technical legal expression for 'to make void.'

[2] 30 & 31 Vict. c. 54; 34 & 35 Vict. c. 102. As to these Acts, see Appendix G.

[3] On Mortmain, and so-called 'Mortmain,' legislation, see Appendix H.

the Act in the beginning by so many trusted leaders of Irish popular opinion.

III.—*Two serious difficulties: the time unfavourable for the introduction of the Act of* 1844; *the hostile attitude of O'Connell.*

To find an explanation of the hostility which the Bill for the establishment of the Bequests Board of 1844 had to encounter, we must bear in mind that the summer of 1844 was a singularly unfavourable time for the introduction of any minor measure of reform for Ireland. O'Connell had just been imprisoned. In Catholic and Nationalist circles all over Ireland, there was a feeling of deep and bitter resentment against the Ministers who had taken the extreme step of prosecuting the great constitutional leader on a far-fetched charge of conspiracy, and whose officials, in their determination to secure a conviction by fair means or by foul, had had recourse to the most scandalous piece of jury-packing that had ever, up to that time, brought disgrace upon the administration of the law in Ireland.

Brought in at such a time, by a Ministry responsible for proceedings so hateful to the Catholics of Ireland, the Bill for the reform of the Bequests Board was not likely to receive a very cordial welcome, or to have its shortcomings, trivial or serious as they might be, criticised in a very friendly spirit.

To all this must be added the attitude of relentless opposition to the new measure, taken up by O'Connell himself. For, over and over again, speaking not merely as a political leader, but as a lawyer, who was looked up to by the great body of Catholics in Ireland as of unquestionable authority, he emphatically denounced the new Act, on legal grounds, as an intolerable invasion of the rights of the Catholic Church in Ireland.

There can be no doubt,—for O'Connell himself made it plain in more than one of his speeches on the Bequests Act,—that his view of the Government measure was coloured by his annoyance at the fate that had befallen a Bill which he had introduced into Parliament early in 1844.[1]

That Bill proposed to invest each archbishop, bishop, or parish priest, in the Catholic Church in Ireland, with the legal properties of a corporation sole. The practical result of this would have been that property granted in proper legal form to, for instance, 'the Catholic Archbishop of Dublin,' would as a matter of course pass on from one Catholic Archbishop of Dublin to his successor, and so on for ever.

At the time when O'Connell's Bill was introduced, and for over twenty years afterwards,—that is, as long as the Protestant Church in Ireland was a State Church,—each archbishop, bishop, rector, and so forth, of that Church was a corporation sole. O'Connell's proposal to endow with the same legal capacity of a corporation sole each holder of a corresponding office in the Catholic Church in Ireland was from the outset doomed to failure : it was looked upon by powerful opponents as a step towards placing the clergy of the Irish Catholic Church, in a matter of great public importance, on the same footing as those of the Established Church.

But, in any case, O'Connell's imprisonment in the May of 1844, as a result of the proceedings in the Irish Court of Queen's Bench, put an end to all prospect of progress being made with his Bill. Thus the Government Bill, the introduction of which had been announced in the beginning of the session, held possession of the field.

[1] See, on p. 101, Dr. Murray's whole-hearted praise of O'Connell's Bill.

IV.—*O'Connell's First Professional Opinion on the Bequests Act.*

O'Connell's legal criticism of the Bequests Act, as distinct from his many speeches against it, was embodied chiefly in two professional 'Opinions.' These were drawn up in the usual form, in answer to queries duly submitted to him through a solicitor.

The Bequests Bill received the royal assent on the 9th of August, 1844, and the first professional Opinion given by O'Connell on the subject of the new Act is dated the 24th of that month.[1]

This Opinion was given by O'Connell in answer to queries submitted for his consideration by the Most Rev. Dr. Cantwell, Bishop of Meath, and the chief points to be noted in connection with it are the following :—

(1) In general terms, O'Connell described the power with which the Commissioners were invested as 'formidable and dangerous.' That power, he said, would bring 'within the great grasp of the Board,' not only all future bequests and other gifts for charitable purposes, but also *all existing charitable funds in Ireland*, with, possibly, the exception of bequests of one particular class. The 'grasp of the Board' might not perhaps extend to funds that were vested in a trustee or trustees 'by a final decree of the Court of Chancery.' But, he said, if this one exception was to be admitted, it certainly was the only one.

And he pointed out that whatever power was given to the Bequests Commissioners as a body was really given to the Protestant members, inasmuch as they formed the majority of the Board.[2]

Moreover, as O'Connell viewed the new Bequests

[1] The Opinion was published in *The Pilot* of August 26th, 1844, and in *The Freeman's Journal* of the following day.

[2] See p. 13, n. 1.

Board and its powers, a charity brought within the 'grasp' of the Board was deprived of all chance of safety. For, having mentioned the one exception, or possible exception, of funds vested in a trustee or trustees by a final decree of the Court of Chancery, he went on to say: 'I do not know of *any other Catholic charity* that can be *safe* under such a tribunal.'

It might well seem impossible even to conjecture what O'Connell could have meant by saying that the power conferred on the Commissioners was 'formidable' or 'dangerous,' or that 'before such a tribunal,' no 'Catholic charities,' with the one possible exception which he mentioned, could be 'safe.' But in considering these sensational statements, we should not lose sight of the account of the Bequests Act given in *The Pilot* newspaper of the 12th of August,[1] not many days before the date of O'Connell's professional Opinion.

In that account it was stated that the Bequests Bill, as originally introduced, left it *optional* with testators, when making bequests for charitable purposes, to choose their own trustees, but that in its final shape, as it passed into law, the enactment was *mandatory*,—the result being that testators were thus *deprived of the power of choosing their own trustees*, and were constrained to have their charitable legacies managed in every detail by Commissioners hostile to the objects of their charitable and pious intentions.[2]

[1] See pp. 9, 10.

[2] As bearing upon the reference to *The Pilot* newspaper in the text above, it may be noted that Mr. Barrett, the editor of that paper, was not only a personal friend of O'Connell's (see p. 8, n. 1), but was also a fellow-prisoner with him in the Richmond Penitentiary, at the time when *The Pilot* article of the 12th of August appeared, twelve days before the date of O'Connell's professional Opinion.

In view of the unrestrained freedom of communication between O'Connell and his fellow-traversers during the imprisonment, it is not very easy to suppose that Mr. Barrett would have taken it upon himself to publish an important legal criticism on the Bequests Act without

So far, then, for O'Connell's criticism of the 'formidable and dangerous' power with which, as he considered, the Charitable Bequests Act invests the Commissioners.

(2) Another weighty count in O'Connell's criticism upon the Act,—one not unconnected with the preceding,—was based upon the 12th section.

This point was stated by him as follows:—

> The 12th section gives the Commissioners power to sue for the recovery of every Catholic[1] charitable bequest which they shall deem to be withheld, concealed, or misapplied, and they have power *to apply the same*, when recovered, to charitable and pious purposes, according to *what they shall deem to be the intention of the donors.*

And O'Connell continued:—

> This section also applies to *all pre-existing charities*, as well as to *all future charities*, and gives *a monstrous extent of power* to the Commissioners.

Undoubtedly the large amount of personal discretion here described by O'Connell as vested in the Commissioners would necessarily bring with it what might be justly characterised as 'a monstrous extent of power.' This, however, is a matter to the consideration of which we shall return later on.[2]

having submitted the criticism to the judgment of his political chief, or indeed without having obtained O'Connell's approval of the publication of it.

Perhaps, too, the following extract from a speech of O'Connell's at a meeting of the Repeal Association in February, 1845, may be worth noting here. It refers to the passing of the Bequests Bill:—

'I was locked up in a prison at the time. . . .

'They brought forward this Bill and it was objected to. I, for the first time in my life, wrote three articles in *The Pilot* against it: I did not put my name to those articles, for if I did put my name to those articles, the communication between Mr. Barrett and his paper would be at once stopped by the Board of Visitors.' (See *The Freeman's Journal* or *The Pilot* of February 11th, 1845.)

But the article in *The Pilot* of August 12th, 1844, referred to in the text above, may not have been one of the three written by O'Connell.

[1] Of course the restrictive word 'Catholic' is out of place here. See p. 10, n. 2.

[2] See pp. 35, 36.

(3) Another of O'Connell's criticisms,—and, as we shall see, more than one of them,—was directed against the 6th section of the Act.[1]

He pointed out that under this section a case might arise in which a legacy payable by the Commissioners, to, for instance, 'the parish priest of *N.*,' would be claimed by *A.B.* and by *C.D.*, rival claimants to the parish. And so, he said, the section invests, or purports to invest, the Commissioners with the obviously uncanonical power, of deciding 'as to *the succession of prelates and priests in the various dioceses and parishes of Ireland*,'—a matter that belongs exclusively to the ecclesiastical jurisdiction. If, then, a Bishop were to be found amongst the Commissioners, and were to take part in giving effect to this section, he would, said O'Connell, become involved in a violation of the canonical rights of the Bishops of other dioceses.

(4) In the same 6th section he found another ground for criticism. The arrangement providing for the constitution of a Committee consisting of the Catholic Commissioners to deal with cases in which Catholic interests were involved, might seem to give security to the Catholic minority[2] of the Board. But this O'Connell declared to be a 'delusion.'

For, he said, the Committee is only '*to certify the facts*; but *their certificate is not conclusive.*' And he added: 'The majority of the Commissioners, being Protestants, *will have to decide how far the certificate is to be carried into effect.*'

(5) Again, the 6th section furnished O'Connell with a third ground of criticism.

This section, he complained, does not deal with the religious concerns of Catholics and Protestants on a footing of equality. It gives, he said, 'a more extensive dominion to the Commissioners over Catholic, than over

[1] See pp. 11-13. [2] See p. 13, n. 1.

Protestant, charities; for, he continued, whilst it authorises the Commissioners, in the case of the Protestant religious bodies, to make inquiries only as to the '*usages* and *discipline*' of those bodies, 'it extends that power,' in the case of Catholic charities, 'to the *doctrine*, discipline, or *constitution*' of the Catholic Church.

(6) The 12th section, which empowers the Commissioners to take proceedings for the recovery of charitable gifts 'withheld, concealed, or misapplied,' formed,—as regards the word '*misapplied*,'—the groundwork of a criticism that was more strongly relied upon by O'Connell, and more vigorously pressed by him, than any other of his criticisms upon the Act.

But the matters referred to in this criticism were not even mentioned in his first Opinion. And as we are here concerned only with that Opinion, these other matters may be held over until we reach the point at which we find them put forward by O'Connell himself.

(7) The same remark applies to his criticism on the 15th section of the Act, or rather on the Proviso which occurs at the close of that section.

(8) The 16th section is, naturally enough, adversely criticised by O'Connell, but a good deal of the sting is taken out of his strictures by his reassuring statement that the restriction imposed by the section can easily be evaded. The section, as he pointed out, makes void any devise or bequest of lands made for a charitable purpose within three months of the death of the testator.[1] But he goes on to say that it does not make void, or in any way injuriously affect, a bequest of *a sum of money charged upon land for a charitable purpose.*

[1] The English Act of 1736,—which was still in force, as regards England, in 1844,—made such bequests for charitable purposes void, no matter at what time in a testator's life the bequests were made. As to all this, see Appendix H., p. 24*.

'It is easy,' he said, 'to evade that clause,[1]—the mode of proceeding is to grant or bequeath, *not the land*, but *a sum of money chargeable on the land* for the intended charitable purpose.'

It is by no means clear that the 16th section can be evaded in the way thus suggested by O'Connell. But this point will be referred to later on.[2]

These were the main points in O'Connell's first professional Opinion on the Act of 1844; and,—at least outside of legal circles,—his criticism seems to have been very generally accepted in Ireland as conclusive.

But reserving for consideration later on, all questions as to the conclusiveness of his criticism, we may now allow the events of the time to tell their own story. In doing so we must bear in mind how strongly those events were influenced in their course by O'Connell's legal Opinion,—an Opinion which, at that time, unrefuted and even unchallenged, held in very general estimation in Ireland a place hardly inferior to that which would have been accorded to a decision of any court of law or equity.

V.—*The Irish Bishops and the Bequests Act: Protest of 'the Hierarchy and Clergy of Ireland.'*

After the publication of O'Connell's Opinion, the report, previously in general circulation, that three of the Bishops, including the Primate (Dr. Crolly) and the Archbishop of Dublin (Dr. Murray), were to be invited to become members of the new Board, and that, if invited, they would probably consent to act, began to be discussed as a matter seriously compromising the reputation of those Prelates. Even lay Catholics worthy of the name

[1] O'Connell's frequent careless use of the words 'Bill' and 'clause,' in reference to the Bequest 'Act' and its 'sections,' may be noted here once for all.

[2] See p. 42.

might, it was said, be relied upon to hold aloof from a body such as O'Connell had shown the new Board to be. Was it to be contemplated that three Bishops of the Church would dishonour themselves and bring discredit upon their order by making themselves parties to a schismatical invasion of the rights of their episcopal brethren throughout Ireland ?

At this point, an important step was taken by some leading ecclesiastical opponents of the new Act. A document entitled a 'Protest of the Hierarchy and Clergy of Ireland' was drawn up for signature, and a printed copy of it, signed by the Archbishop of Tuam, was circulated amongst the Archbishops and Bishops of Ireland by three prelates,—the Archbishop of Tuam himself, and the Bishops of Raphoe (Dr. Patrick M'Gettigan) and Meath (Dr. Cantwell),—with a request in each case for the signature of the Bishop to whom the Protest was sent, and, as far as possible, the signatures of his Clergy.[1]

The Protest began with the high-sounding words, 'We the Archbishops, Bishops, and Clergy of Ireland,' and it expressed the conviction of all who signed it,—a conviction which they declared they had formed as the result of their having 'studied with attention' the provisions of the Act,—

> That the measure is *fraught with the worst consequences to religion*, and, if carried into operation, will finally lead to *the subjugation of the Roman Catholic Church in Ireland to the temporal power*.[2]

As to those Bishops who might have any thought of accepting the office of Commissioner, the Protest bluntly informed them that if they accepted that office, they would be,—

[1] The Protest seems to have been forwarded for signature to all the members of the Irish episcopacy. The copy sent to the Archbishop of Dublin, with a request for his Grace's signature, is in its place in the Dublin Diocesan archives.

[2] See *The Freeman's Journal* of September 21st, or *The Pilot* of September 23rd, 1844.

Called upon, in the exercise of their functions as Commissioners, to interfere and pronounce in spiritual matters belonging to the jurisdiction of other Bishops, which is *a flagrant violation of the canons of our Church.*

When the 'Protest' was published in the newspapers, towards the end of September, it bore the signatures of the Archbishop of Tuam, of twelve Bishops of suffragan sees, of an Administrator of a vacant see, and of over seven hundred of the clergy, secular and regular. It was to be republished from time to time, with additional signatures of 'The Archbishops, Bishops, and Clergy of Ireland,' according as the signatures were received.[1]

VI.—*The Holy See approached: strong statements of the Rector and Vice-Rector of the Irish College, Rome, and of an Irish visitor to Rome.*

Also about this time, some leading opponents of the new Act took another important step. They sought to obtain from the Holy See a condemnation of the Act and of the machinery that was to be set up for its administration, so that no Catholic could become a Commissioner, or otherwise take a responsible part in the administration of the Act, without openly disregarding the voice of the Church. Thus they hoped to make it impossible for the Government to constitute the new Board of Commissioners at all.[2]

As a first step, O'Connell's Opinion was forwarded to Rome by the Archbishop of Tuam. Dr. Cullen, then Rector of the Irish College, naturally regarded the Opinion as a document of unquestionable authority, and wrote to Dr. MacHale on the 11th of

[1] In what was apparently its final form, the Protest bore the signatures of the same Archbishop, the same suffragan Bishops, and over nine hundred priests.

[2] See p. 2.

September, 1844, speaking of the Bequests Act in language of strong condemnation :—

I was delighted to see your Grace declare such decided war against the new 'Charity Bill.'

It is a most abominable insult to Catholics to pretend that it is a great boon. God grant that no bishop will accept of office in the Commission !

O'Connell's Opinion must have great weight. I was glad also to see that Mr. Cooper [a curate in Marlborough-street] and Mr. Flanagan [Parish Priest of St. Nicholas's, Francis-street] had come out against it. This shows that the Dublin clergy are on the right side. I hope the opposition will be so strenuous that the Government will not be able to advance a step. . . .

I wrote a letter to Mr. Cooper to congratulate him on his letter, and also to let him know *the opinion entertained in Rome on the Bill.*[1]

Dr. Cullen also promised Dr. MacHale that he would translate O'Connell's legal Opinion into Italian, and place it in the hands of the Pope.[2]

This letter of the Rector of the Irish College is introduced by the biographer of Dr. MacHale into his narrative with the strange remark that from this letter we may see how decidedly adverse to the Charitable Bequests Act was 'not only the opinion of *the Propaganda*, but *that of Pope Gregory XVI. himself* (!), so clear-sighted, so independent in his judgment, and so outspoken in favour of Ireland.'[3]

It is interesting also to note that the newspapers of the time contain two long and elaborate letters from the amiable Vice-Rector of the Irish College, the late Most Rev. Dr. Kirby, unsparing, and even violent, in denunciation of the Government measure.[4]

[1] See *The Life of the Most Rev. Dr. MacHale, Archbishop of Tuam.* By the Right Rev. Mgr. O'Reilly. Vol. i. p. 557.

Henceforth in these pages, Mgr. O'Reilly's biography of the Archbishop will be referred to as *The Life of the Most Rev. Dr. MacHale*, or, simply, as *The Life.*

[2] Ibid.

[3] Ibid.

[4] See *The Freeman's Journal* of the 5th, or *The Pilot* of the 7th, of October, 1844.

In the first of these, written on the 16th of September, Dr. Kirby expressed his conviction that no Catholic could be found,—

> So *vile*, so *perverse*, and so *dishonoured*, as to join this *horrid*, this *schismatical*, this *truly impious* attempt to *prostrate the liberties of the Church of God at the feet of its ancient and inveterate enemies.*

Dr. Kirby's letters appeared under the heading: 'To the Lay Catholics who may be invited to act as members of the Charity Commission.' He, no doubt, saw the awkwardness of having it supposed that he was taking it upon himself to address to the two prelates,—the Primate and the Archbishop of Dublin,—who it was generally assumed would be invited to become members of the Commission, the admonitions contained in his letters.

In his second letter,[1] written on the 29th of September, Dr. Kirby informs the laymen to whom it was ostensibly addressed, that,—

> *No Catholic* (!) can regard the present Commission, or *the cursed law from which it emanates*, with any other feelings than those of horror.

More noteworthy still, Dr. Kirby's main thesis in this letter was that, under certain decrees of the Council of Trent, any Catholic becoming a Commissioner under the Act then about to be brought into operation in Ireland would incur the censure of excommunication!

In his reference to censures inflicted by the Council of Trent, Dr. Kirby did not stand alone. The Rector of the Irish College, Dr. Cullen, writing to the Archbishop of Tuam a few days afterwards, referred to canons and decrees of the Council of Trent, but, as might be expected, in guarded terms. Thus he said:—

> There are some canons and decrees of the Council of

[1] See *The Freeman's Journal* of October 17th, 1844, or *The Pilot* of the following day.

Trent that *appear* to excommunicate persons assuming the functions now to be attributed to the Commissioners. It would be well that Catholics should be made aware of such decrees being in existence.[1]

All this was most encouraging to the Archbishop of Tuam. There was as yet indeed no actual condemnation of the Bequests Act by the Pope himself, or by any official authority of the Curia. But there was no mistaking the view that was held, and not only held, but expressed without reserve, by the authorities of the Irish College in Rome. And this derived its chief significance from the fact that Dr. Cullen was known to stand high in the confidence of Gregory XVI., who was then Pope.

About the same time too there occurred another incident of some importance in the light that it threw upon the state of feeling in Rome on the subject of the Bequests Act.

A well-known Irish priest, the Rev. James Maher, Parish Priest of Carlow Graigue, a man not without experience in Irish public affairs, happened just then for reasons of health to be staying in Rome and its neighbourhood. He was an uncle of Dr. Cullen, and when in the city he stayed at the Irish College. For various reasons, he was likely to be well-informed as to the views held in official circles in Rome in reference to Irish affairs.

On the 10th of October, Father Maher addressed to the editor of *The Dublin Evening Post*, a letter announcing that both Dr. Cullen and Dr. Kirby desired to have their names attached to the 'Protest of the Hierarchy and Clergy of Ireland'[2] against the Bequests Act.

This announcement was naturally regarded in Ireland as of high significance. Father Maher's letter, which was published also in *The Freeman's Journal*, was

[1] *Life of the Most Rev. Dr. MacHale*, vol. i. p. 558.
[2] See p. 24.

introduced by the editor of that paper to his readers as follows :—

Insinuations have been thrown out, calculated to convey an impression that there existed a general feeling in the Holy City in favour of the 'Peel' Bequests Bill.

The majority of our readers need not be informed who Dr. Cullen is. . . . It may not, however, be unnecessary to state that he is President of the Irish College at Rome, and from his position is naturally looked upon as *the confidential*, though not official, *organ of communication between the Holy See and these countries.*

It will be at once acceded (*sic*) that the Rev. President is in a position the most favourable for becoming acquainted with the feelings and wishes of the Pontifical authorities; and in the addition of his name to the Protest, we have a strong indication, if not something more, of the feelings with which the attempt to degrade the Irish Church is received at Rome.[1]

Then follows the text of Father Maher's letter, from which it will be sufficient to quote one short paragraph :—

The Act is *considered by all at Rome* as an infringement on the sacred rights of bishops, . . . destructive of ecclesiastical discipline, and a gross violation of natural rights. *There is no second opinion on the subject.*

But it will be seen a little later on, that on this occasion,—as had often been the case in the past, and will often, no doubt, be the case in the time to come,—the gossip of Rome was anything but trustworthy.

VII.—*The Meeting of the Irish Bishops in November*, 1844.

The expected meeting of the Irish Bishops in reference to the various ecclesiastical questions arising

[1] *The Freeman's Journal*, December 11th, 1844. For some reason, the names of the Rector and Vice-Rector, if they had been actually attached to the 'Protest,' were afterwards withdrawn from it. See Dr. Cullen's letters on p. 129.

out of the new Act, was held in Dublin on the 13th of November, 1844, and following days.

For some reason the decision come to at the meeting was not made public for some weeks afterwards. But, in the meantime, wide circulation seems to have been given to a report that a Rescript adverse to the Bequests Act, from Rome, had been read at the meeting, and that consequently the Bishops were, or appeared to be,[1] unanimously opposed to the Act.

But all this was mere groundless rumour. The Bishops were not by any means unanimously opposed to the Act, in the sense of considering that no Bishop should accept the office of Commissioner. They were, of course, unanimous in considering that some provisions of the Act,—notably those of its 16th section,[2]—were open to grave objection. But the Resolutions adopted by the meeting[3] show that this was a totally different thing from considering that Bishops were not free to become Commissioners.

And as to the alleged Roman Rescript, no Roman document of any kind referring unfavourably to the Bequests Act was read either at the meeting of the Bishops in November, 1844, or at any other meeting of their body before or since.[4]

Such, however, was the excited state of the public mind in Ireland in opposition to the Bequests Act, that it need cause no surprise to find that almost any statement, however wild, that was put in circulation adverse to the Act, passed current with large sections of the general public. But it

[1] See p. 31, n. 3.

[2] See p. 14 (7).

[3] See p. 33; 33, n. 2.

[4] As appears from various publications of the time, there was read at the Bishops' meeting in November, 1844, an important letter of instruction from the Holy See inculcating upon ecclesiastics the duty of speaking and writing with moderation in the advocacy of their political views.

See, on this letter, or so-called 'Rescript,' pp. 113, 134.

is not so easy to account for the insertion of statements such as the following in works published forty years later, and purporting to be of a historical character.

In a Life of Frederick Lucas, published in 1886, we find the following :—

> A rescript from Rome was read at the second meeting of the Synod,[1] which was held on the 13th November. The rescript was *adverse to the Act, and favoured the opposition.*[2]

Again, in *The Life of Dr. MacHale,* published some years later still, we find an almost identical statement, with an important addition :—

> Tuesday (Nov. 13th) came. A rescript from Rome, *such as Dr. MacHale had asked for,* and *adverse to the Bequests Act,* was read; and the Bishops were apparently[3] unanimous.[4]

But, as we shall see, the 'Rescript' which Dr. MacHale asked for, and which is stated in the foregoing extract to have been read at the Bishops' meeting, was not even 'asked for' by the Archbishop until the 25th of November,[5] more than a week after the Bishops' meeting had been held! Moreover, no such Rescript as the Archbishop had asked for ever came. The letter that came in response to his Grace's request was of a wholly different kind.[6]

In a later chapter of the work from which the second of the foregoing quotations is taken, the fiction about the Roman Rescript is repeated in a singularly offensive form. And to make the statement, if possible, still more offensive, it is inserted under the heading, 'Death of Dr. Crolly, Archbishop

[1] For a considerable time in Ireland, every general meeting of the Bishops was designated a Synod.

[2] *Life of Frederick Lucas, M.P.* By his Brother, Edward Lucas. London, 1886. Vol. i. p. 175.

[3] It may well be asked, Why 'apparently'?

[4] *Life of the Most Rev. Dr. MacHale,* vol. i. p. 572.

[5] See pp. 43-45.

[6] See pp. 127, 128.

of Armagh: *his subservience to Dr. Murray and the Government.*' The statement thus introduced is as follows:—

The solemn condemnation by the Holy See (!) *of the Bequests Bill* did not prevent the two Primates from continuing *to exercise till their death the office of Commissioners* on the Bequests Board.[1]

It should not be necessary to vindicate the character of either of the prelates whose memory has thus been so wantonly assailed. But unhappily the calumny must have received a wide circulation from its insertion in a work not unnaturally regarded by many as a work of authority. In the interests of historical truth it may be well to put distinctly on record here that the offensive charge so recklessly brought against those two prelates,—and primarily against the Archbishop of Dublin,—is without a particle of foundation.

Neither the Bequests Bill nor the Bequests Act has been, at any time, or in any manner, condemned by the Holy See. As we proceed we shall see what was the real attitude of the Holy See towards this measure; its attitude, on the one hand, towards those who assailed the enactment as antagonistic to the liberty and rights of the Church, and, on the other hand, its attitude towards those who treated the Act with consideration, not indeed regarding it as by any means perfect, but feeling satisfied that none of its drawbacks were fatal to its usefulness, and that at all events some of them could be rendered harmless by wise administration.

To all those who had put faith in the fiction about the Roman Rescript and the consequent unanimity, or 'apparent'[2] unanimity, of the Bishops in opposition to the Act, the true account of the

[1] *Life of the Most Rev. Dr. MacHale*, vol. ii. p. 202.
[2] See p. 31, n. 3.

result of the Bishops' deliberations when published must have come as a startling surprise.

When the result was made known—which was not until towards the end of December,—it was seen that the Bishops had not protested against the Act, either as uncanonical in its tendency, or as in any other way at variance with ecclesiastical discipline.

After a reference to the different views that had been taken of the Act by different Bishops, the Resolution declared that each Bishop was free to follow the dictates of his conscience in the matter.

It is as follows :—

RESOLVED—That as the prelates have taken different views of the new Catholic Bequests Act, it is the opinion of this meeting that every prelate be left at *perfect liberty to act according to the dictates of his own conscience respecting that measure.*[1]

The Resolution, as is manifest, did not express any positive approval of the Act.[2] It simply left each Bishop free to act in reference to the Act according to the dictates of his own conscience. Thus one Bishop might feel free to accept the position of Commissioner, if offered to him; another might feel it to be his duty to strive to have the Act repealed by Parliament or to have a protest made against it by the Holy See.

VIII.—*O'Connell's First Professional Opinion on the Bequests Act examined.*

The points relied on by O'Connell in his Opinion as showing decisively that no countenance should be

[1] See *The Freeman's Journal* of December 26th, and *The Pilot* of the following day.

[2] It would seem that a second Resolution, to this effect, was adopted by the meeting. But the text of this explanatory Resolution does not appear to have been published.

The first Resolution, however, really needs no explanation: it speaks for itself.

given to the Bequests Act by any Catholic, least of all by any ecclesiastic, may be considered here. They will be considered in the same order in which they were stated in a former section.[1]

(1) As to the 'formidable and dangerous' character of the power conferred upon the Commissioners by the Bequest Act as viewed by O'Connell,[2] there was, in reality, nothing 'formidable' or 'dangerous' about it. It was simply a power to sue in the Courts,—with the sanction of the Attorney-General or Solicitor-General,—and thus to set the Courts in motion, for the recovery of any charitable gift 'withheld, concealed, or misapplied,' so that the gift, when recovered, might be applied, not according to any personal ideas of the Commissioners themselves, but '*according to the intention of the donor or donors.*'

A power such as this might indeed be 'formidable and dangerous' to dishonest executors, trustees, or other persons, who, though neither executors nor trustees, might have got hold of a gift intended for some charitable purpose, and applied it to some other purpose not intended by the donor. But how could such a power be formidable to any honest man?

The only conceivable foundation for O'Connell's statement is that which is indicated in the account of the Bequests Bill given in *The Pilot* of the 12th of August,[3] and apparently,—at least to some extent,—endorsed by O'Connell himself.[4]

But then, that account of the Act is quite at variance with fact. The Act of 1844 in no way interfered with the power of testators or of other donors to choose for their bequests or other gifts,—charitable or non-charitable,—their own trustees. It no way constrained testators or other donors to have their charitable intentions and liberality 'consigned to' or 'vested in,' or in any respect 'managed by,' the Commissioners.[5]

[1] See pp. 18-23. [2] See pp. 18-20. [3] See pp. 9, 10.
[4] See p. 19; 19, n. 2. [5] See p. 10.

The distinction sought to be set up, whether by the editor of *The Pilot* or by O'Connell, between the 'optional' character of the Bill in this respect, as it was at first introduced, and the 'mandatory' character imported into it before it passed into law, is purely imaginary.

But it is quite unnecessary to consider this point at any length. The Charitable Bequests Act of 1844 has now been in operation for seventy years, and in the course of that long time it has effectively told its own story.

At first, no doubt, in the beginning of 1845, a scare was created, and not at all unnaturally, by O'Connell's alarmist pronouncements.[1] But the scare speedily died away; and, ever since, testators have gone on, without hesitation, making their charitable bequests and appointing trustees of their own selection for the administration of those bequests; and the trustees so appointed have continued to administer the trusts confided to them, without interference, or the fear of interference, from the Commissioners.

(2) The next point in O'Connell's criticism of the Act,—one not unconnected with the preceding,—was based upon the 12th section.

This point was stated by him as follows:—

> The 12th section gives the Commissioners power to sue for the recovery of every Catholic charitable bequest which they shall deem to be withheld, concealed, or misapplied, and they have power *to apply the same*, when recovered, to charitable and pious purposes, *according to what they shall deem to be the intention of the donors*.[2]

And, he continued:—

> This section also applies to *all pre-existing charities*, as well as to *all future charities*, and gives *a monstrous extent of power* to the Commissioners.

Undoubtedly the large amount of personal discretion

[1] For some instances of this, see p. 90.

[2] See p. 20.

here described by O'Connell would necessarily bring with it 'a monstrous extent of power.' But the answer to this part of his criticism is that no such discretion is vested in the Commissioners.

The Commissioners, as already mentioned,[1] are empowered, but subject always to the sanction of the Attorney-General or Solicitor-General, to sue for the recovery of any charitable gifts, 'withheld, concealed, or misapplied.' But when a gift, found by the Court to have been 'withheld, concealed, or misapplied,' is thus recovered by the Commissioners, they are to apply it, '*according to the intention of the donor*,'—not at all according to what they may merely '*deem*' to be the intention of the donor.

The word 'deem,' is, of course, the foundation of O'Connell's whole case under this second head. But, incredible as it may seem, that word does not occur in the Act, either in its 12th section or elsewhere.

Can O'Connell have been thinking of the powers vested in the former Commissioners[2] under the Act of 1800? In that Act power was given to the Commissioners in certain cases to apply a gift according to what they should 'judge,'—that is to say, 'deem,'—to be 'nearest and most conformable' to the intentions of the donor. But that was in the repealed Act of 1800, and the fact that no such power is given in the new Act of 1844, makes it all the harder to account for O'Connell's interpolation of the word 'deem' in his statement of the powers of the Commissioners under the later Act.

(3) More than one point in O'Connell's criticism of the Bequests Act was directed against its 6th section.[3]

O'Connell, as we have seen,[4] pointed out that, under

[1] See p. 13 (4).
[2] See p. 5.
[3] See pp. 11-13; 21, 22.
[4] See p. 21.

this section, a case might arise in which a legacy payable by the Commissioners to, for instance, 'the parish priest of *N.*,' would be claimed both by *A.B.* and by *C.D.*, rival claimants to the parish. Thus, he said, the section invests, or purports to invest, the Commissioners with an obviously uncanonical power, the power, namely, of deciding 'as to *the succession of prelates and priests in the various dioceses and parishes of Ireland*,'—a matter belonging exclusively to the ecclesiastical jurisdiction. And from this he inferred that if a Bishop were to be found amongst the Commissioners, and undertook to give effect to this section, he would thereby become involved in a violation of the canonical rights of the Bishops of other dioceses.

One would have thought that a great public man and a lawyer like O'Connell would have seen in what a false position he placed himself by overstepping the boundary of that legal domain within which he could claim to speak with expert authority, and taking it upon himself to speak, as if with authority, on a matter of canonical jurisprudence,—a department of law that lay altogether outside his sphere of legal knowledge.

It is more surprising still that even after he had the best means of knowing that neither the Primate, Dr. Crolly, nor the Archbishop of Dublin, Dr. Murray, nor the Bishop of Down and Connor, Dr. Denvir, had any misgiving as to the canonical lawfulness of their exercising the jurisdiction conferred on them as Commissioners by the Act,—these three prelates having at the time accepted nomination as Commissioners,—he saw no impropriety in writing, in a letter sent by him for publication in the newspapers:—

> Layman though I be, *nothing* can, to my humble judgment, *be more manifest* than the *uncanonical* nature of *this Commission jurisdiction* (!) [1]

[1] The above passage occurs in a letter of O'Connell's written on the 6th of January, and published in *The Pilot* of January 10th, 1845, and in *The Freeman's Journal* of the following day.

We can easily imagine how he would himself have dealt with such a case, if, on a point of English law, such as the construction of an Act of Parliament, anyone not a professional lawyer,—an ecclesiastic, for instance, —had the hardihood publicly to express dissent from a view of the law to the accuracy of which O'Connell had, as a lawyer, publicly pledged himself. Indeed we shall see, as we proceed, how he acted when such a case actually occurred.[1]

It would, of course, be a glaring transgression of a fundamental principle of the canon law if any Commissioner, whether layman, priest, or bishop, undertook to decide as to the canonical succession to a parish in a diocese over which he had not episcopal jurisdiction. But the Commissioners, in exercising their powers under the 6th section of the Bequests Act, neither decide, nor undertake to decide, any such point.

Manifestly they do not undertake to decide, nor could they decide, anything as to the canonical rights of a claimant. Nor are they empowered to decide any question even of civil right. Such a question can be decided only in the civil courts, and the 6th section of the Act of 1844 expressly enacts that nothing contained in that Act 'shall be construed *to limit or affect the jurisdiction of any court of law or equity.*'[2]

Thus what the 6th section does is to lay down a line of procedure to be followed in doubtful cases by the Commissioners in the case of gifts entrusted to their administration. But in following that line the Commissioners prejudice no claimant's rights. On the information before them, *A.B.* seems to them to be the person entitled to the gift, and they hand it over to him accordingly. But as to whether *A.B.* is, or is not, in canon law, or in any other law, parish priest of *N.*, they do not undertake to decide,—nor have they

[1] See pp. 82-84 [2] See p. 13.

any means of deciding. They consequently leave the decision of it to the jurisdiction to which it belongs.[1]

It would of course have been in every way more satisfactory if the question as to the person intended to take the benefit of a legacy or other gift bequeathed to the holder of a certain ecclesiastical office,—as, for instance, to the parish priest of a named parish,—were to be referred, not to any Committee of the Commissioners, but to the proper authority of the Church or body concerned. But neither in Church nor in State does legislation always take the most satisfactory form. And besides, the question raised by O'Connell and his followers in the present case was, not whether the provisions of the 6th section of the Bequests Act fall short of being as satisfactory as they might be, but whether they are unsatisfactory to the extent of being in conflict with the canon law of the Catholic Church.[2]

[1] The difference between the two things mentioned in the text above is far from being a merely verbal one.

Let us suppose, for instance, that the Commissioners, in accordance with the provisions of the 6th section, have paid to *A.B.*,—one of two claimants to the parish of *N.*,—a legacy that had been entrusted to them for payment to 'the parish priest of *N.*,' and that, after they had done so, and after it was publicly known that they had done so, the executor of another will in which there is a further legacy bequeathed to 'the parish priest of *N.*' considered that, not *A.B.*, but *C.D.*, the other claimant to the parish, was the rightful claimant to it, and accordingly paid the legacy, not to *A.B.*, but to *C.D.*

If the Commissioners, by acting in accordance with the provisions of the 6th section of the Act of 1844, had thereby, in any sense of the word, 'decided' that *A.B.* was the rightful claimant to the parish, the executor,—unless and until their decision was set aside in the Courts,—might be bound to pay the legacy of which he had charge, not to *C.D.*, but to *A.B.* But, in reality, the executor would not be bound by the action of the Commissioners, or affected by it in any way.

They act in conformity with a line of procedure laid down for their own guidance. In doing so they are held personally clear of responsibility. But their action can in no way affect the rights of executors or trustees, or of anyone outside their own body.

[2] On this point of referring to the Bishop in the case of an episcopal Church, or to the corresponding authority in a Protestant Nonconformist body some matters of very considerable interest as well as importance will arise for consideration later on. (See pp. 120-122.)

(4) In the same 6th section O'Connell found further ground for criticism. The arrangement providing for the constitution of a Committee consisting of the Catholic Commissioners to deal with cases in which Catholic interests were involved, might seem to give security to the Catholic minority of the Board. But this, O'Connell declared to be a mere 'delusion.'

For, he said, the Committee is only '*to certify the facts,* but *their certificate is not conclusive.*' And he added: 'The majority of the Commissioners, being Protestants,[1] *will have to decide how far the certificate is to be carried into effect.*'

This criticism would seem to be sufficiently disposed of by a reference to the section itself, which defines as follows the duty of the Commissioners regarding a certificate presented by a Committee, Protestant or Catholic, as the case may be:—

The Committee . . . shall certify to the Commissioners, [1] *who is,* according to the uses and intendment of such church or body, *the person* for the time being *intended to take the benefit of such donation, devise, or bequest,* or [2] *other particular facts* concerning the usages or discipline of such church or body, *necessary to be known for the due administration of the trust* according to the true intent and meaning of the donor;

And the Commissioners shall receive every such certificate as evidence of the facts certified,

And shall give effect to such donation, devise, or bequest accordingly, so far as the same may be lawfully executed according to the provisions of this Act.[2]

(5) Again, as to the same 6th section, O'Connell alleged that it does not deal with the religious concerns of Catholics and of Protestants on a footing of equality. It gives, he said, 'a more extensive dominion to the

[1] See p. 13, n. 1.

[2] By reason of the restriction conveyed in the last words of the above paragraph, the certificate could not override either (*a*) the provision of the 15th section declaring,—see p. 14 (7),—that this Act of 1844 does not repeal the sections of the Act of 1829 relating to the religious Orders, or (*b*) the provision of the 16th section of this Act annulling (see ibid.) a bequest of real property made within three months of the death of a testator.

Commissioners over Catholic, than over Protestant, charities': for, whilst in the case of the Protestant religious bodies, it authorises the Commissioners to make inquiries only as to the '*usages* and *discipline*' of those bodies, 'it extends that power,' in the case of Catholic charities, 'to all facts concerning *the doctrine, discipline, or constitution*,' of the Catholic Church.

This, no doubt, is one of the most formidable looking of O'Connell's criticisms on the Act. But the answer to it is simple. The words 'doctrine' and 'constitution,' on which he based this charge of inequality of treatment in a matter of such grave importance to Catholics, do not occur in the Act, whether in the 6th section or elsewhere!

The words '*doctrine, discipline, or constitution*,' were to be found in the 6th clause of the Bill in some of its stages as it was passing through Parliament. They were, however, removed from it, and the words '*usages or discipline*' substituted for them, before the Bill was passed into law.

Moreover, the fact that these words, '*doctrine, discipline*, or *constitution*,' were found in the Bill before it was passed into law cannot be regarded as explaining, or even as tending to explain, O'Connell's misquotation. Those words, when they occurred in the Bill, did not apply to the Catholic Church alone; they applied in precisely the same way to the Protestant Church and other Protestant religious bodies, on the one hand, and to the Catholic Church on the other. And yet O'Connell, in his Opinion, quotes those words from the Act,—where they do not occur at all,—as applying there to the Catholic Church alone!

(6) For the reason already stated,[1] the criticism that would otherwise be considered next in order,—that, namely, on the word 'misapplied' as it occurs in the

[1] See p. 22 (6).

12th section of the Act,—is reserved for consideration in its more natural place later on.

(7) The same remark applies to O'Connell's criticism on the Proviso which occurs at the close of the 15th section.[1]

(8) As to the objectionable 16th section of the Act, O'Connell, as we have seen,[2] allowed it to pass without any exceptionally severe criticism. He did so on the ground that the section could be evaded by the simple expedient of bequeathing, not the land in question, but a sum of money charged upon it.

But apparently he was as unfortunate in his attempt to discover a way of evading the 16th section of the Act as he was in endeavouring to show that the Act was a repressive rather than a remedial one.[3]

The point raised by him in reference to the evasion of the 16th section came before the Court of Chancery in Ireland in 1863,[4] on a bequest in the will of a Mr. Blake, who died within three months of the execution of the will.

In Mr. Blake's will there was a bequest of an annuity of £100, charged upon certain lands, for a charitable purpose. The Lord Chancellor (Maziere Brady) held that the bequest was void: the word 'charged,' no doubt, does not occur in the 16th section of the Act of 1844; but, he said, he could see no distinction between bequeathing charges on lands and bequeathing the lands themselves.

This decision was not appealed against, and it seems that it has since been followed in the Courts.

[1] See p. 22 (7).
[2] See p. 22 (8).
[3] It is strange that it did not occur to O'Connell to suggest that recourse might be had to the device, well known to the law, now commonly designated in Ireland 'the O'Hagan clause.' As to this, see Appendix K.
[4] *Sherlock* v. *Blake*, 10 Ir. Jur. (N.S.) 350.

IX.—*The 'Protest of the Hierarchy and Clergy of Ireland' re-published; the Archbishop of Tuam's suggestion to the Holy See.*

A few days after the meeting of the Bishops in November, 1844, the 'Protest,' which previous to the meeting had been signed by so many Bishops and priests, was republished, with additional signatures, in the newspapers.[1]

Moreover, within the following week, the Archbishop of Tuam,—as was first made public not many years ago by his Grace's biographer,[2]—wrote on the 25th of November, to Cardinal Fransoni, then Cardinal-Prefect of Propaganda, urging that a mandate overruling the decision of the Irish Bishops, should forthwith be sent to them from the Holy See :—

> If your Eminence only (!) writes a timely letter to the bishops of Ireland, or to the four archbishops, bidding them not to accept any place whatever [on the Bequests Board] without the consent of their brother prelates and that of the Apostolic See, then *religion will be in safety here* (!) . . .
>
> There will be *time enough afterwards* for the Holy See to have this Act subjected to a thorough examination and to pronounce upon it a definitive judgment.

That the object thus aimed at was that the new Act should be rendered unworkable, is stated very clearly in the Archbishop's letter to the Cardinal-Prefect :—

> Five weeks yet remain before this Act is to be enforced.
>
> If no Catholic member can be found for the Board of Commissioners, the law will be absolutely void, because the Board cannot work validly without the prescribed number of Catholic members.
>
> Moreover, lay Catholic Commissioners alone will not

[1] See *The Freeman's Journal* of November 26th, 1844.
[2] *Life of the Most Rev. Dr. MacHale*, vol. i. pp. 554-557.

suffice for carrying out the purposes of the legislator. Without the concurrence and approbation of the bishops, our enemies could have no prospect of giving efficiency to this baneful Act.[1]

In another passage the Cardinal-Prefect was assured that,—

If some bishops, deceived by the frauds *and bribes* (!) of the Castle officials, . . . consent to be members of the Board, they will assuredly forfeit all respect from the people, and all confidence from their brother-prelates. Instead of being looked upon as the servants and helpmates of the Apostolic See in advancing the Catholic faith, they will incur *such odium and aversion as never has yet been felt in Ireland towards the dignitaries of the Catholic Church.*[2]

The reference to 'bribes' in the preceding extract is explained by the following :—

Their business [that is to say, the 'business' of any bishops who become members of the Bequests Board] will be *to procure honours and places for their relatives and others;* and the cares of worldly pursuits (!) will distract them from seeking the spiritual welfare of their flocks.[3]

So far, the considerations thus urged amounted to little more than strongly-worded expressions of the Archbishop's personal opinions. A much more serious difficulty must have been created in the mind of the Cardinal-Prefect by some statements put forward by the Archbishop in his letter as statements of fact. These evidently were inferences deduced by him,—no doubt in absolute good faith, but by no means with perfect accuracy,—from statements made by O'Connell.

Thus, for instance, the Cardinal-Prefect was assured of the following :—

This Act annuls all bequests made to Religious Orders (!), whom it thus seeks to extinguish by withdrawing from them all means of sustenance.[4]

[1] *Life of the Most Rev. Dr MacHale,* vol. i. p. 556.
[2] Ibid. [3] Ibid. [4] Ibid., p. 554.

And again :—

It overturns, or endeavours to do away with, the Sacred Canons of the Church defining the jurisdiction of Bishops, *by vesting their rights, their property, and the administration of legacies made to the poor* (!), in a Board of Commissioners of a novel and unheard of description.[1]

As to these definite statements it is sufficient to note :—

(1) That the Bequests Act, does not annul bequests to Religious Orders, but simply leaves unrepealed the annulling provisions of the Catholic 'Emancipation' Act of 1829,—the Act which O'Connell himself assured a Franciscan priest who had consulted him on the subject in that year, was an excellent one in every respect,—'*aye, in every respect*';[2] and,

(2) That the Bequests Act does not vest, or attempt to vest, in the Commissioners the 'property' or the 'rights' of Bishops, or the administration of legacies made to the poor and vested for that purpose either in Bishops or in any other competent trustees.

X.—*O'Connell's new campaign : Public Meetings of protest to be held in Dublin and throughout Ireland.*

In the interval between the sending of Dr. MacHale's letter to Rome towards the end of November, and the receipt of a letter from the Cardinal-Prefect of Propaganda in reply, O'Connell, as might have been anticipated, was by no means idle. Indeed at this very time he was engaged in starting a new campaign with the view of recovering some of the ground that had been lost through the failure of the effort to

[1] *Life of the Most Rev. Dr. MacHale*, vol. i. p. 554.

[2] See Appendix L. for O'Connell's statement of the harmlessness of the penal sections of the 'Emancipation' Act of 1829 ; and Appendix M. for Sir A. M. Porter's notable protest against the retention of those indefensible sections unrepealed upon the statute-book.

obtain from the Bishops a condemnation of the Act on religious grounds.

The keynote of the new agitation was at once boldly struck in the newspapers: the Irish Church, betrayed by the Bishops, had now to be saved by the laity. It was also suggested that there was no reason why the work of rescue should be left to the laity alone. Those of the Bishops and clergy who were dissatisfied that the Bishops' meeting had ended without a condemnation of the new Act, were specially appealed to. They were called upon to organise their forces and to set to work anew.

Both calls were promptly responded to. For many weeks, the newspapers continued to chronicle the various incidents of the agitation, as meeting after meeting was held in protest against the absence of an episcopal condemnation of the Act, and against the unworthy attitude of those Catholics,—not lay Catholics only, but even Bishops,—who, it was rumoured, were prepared to take part in the 'schismatical' work of administering the Act as Commissioners.

In the 'Catholic Annals' of 1844 in the *Irish Catholic Directory* for 1845, we find recorded under the date November 25th,—

> From this date, meetings were held in nearly every diocese, parish, and district in Ireland, against the miscalled Charitable Bequests Act.

The opening meetings of the series were to be held in Dublin, where, for every purpose that could be achieved by organisation, O'Connell's power was supreme. The city was mapped out into districts, which, according to an arrangement not very unusual at the time, followed the lines of division of the Protestant parishes.[1] Each district was to have its meeting.

[1] See pp. 71; 85, n. 1; 88, n. 1.

After a brief interval the meetings in Dublin began to be held, and at practically every one of them, O'Connell, with his marvellous readiness and apparently inexhaustible energy, was the chief speaker.

With characteristic skill, he now put away as far as possible into the background his first professional Opinion,—that of the 24th of August.[1] There was good reason for this. Attention had been publicly called to the fact that in that Opinion he had committed the strange blunder of basing some of his main grounds of objection to the Act upon words that had, no doubt, at one time had a place in the Bill, but that had been removed from it before it passed into law.[2] In view of this, he had, not unnaturally, been charged with having given that Opinion as a politician rather than as a lawyer.

The Opinion, too, as regarded its various assertions about the bearing of the Act upon religious matters, had been seriously discredited by the result,—then more or less generally known, but not as yet formally published,—of the Bishops' deliberations at their meeting in November.[3]

XI.—*General Outline of O'Connell's speeches at the Meetings in Dublin.*

At each of the meetings held in Dublin, O'Connell was the principal speaker, and he necessarily referred to the same topics, with but slight variation, in his speeches at meeting after meeting. To avoid useless repetitions, we may take first the following general account of the series of his speeches as a whole. Some points of importance special to particular meetings will afterwards be separately mentioned.

1. Perhaps the most striking feature of O'Connell's

[1] See pp. 18-23. [2] See pp. 40, 41. [3] See p. 33.

speeches at these meetings was that he practically abandoned, with but two exceptions, the points on which he had laid stress in his criticism on the Act in his first professional Opinion, only three months before.[1]

2. Of the various grounds of that former detailed criticism of the Act, he now seemed to attach importance to only the following two :—

(1) The 6th section of the Act, which, he asserted, involved an uncanonical interference by outsiders, —laymen, ecclesiastics, or bishops,—in matters strictly reserved by canon law to the jurisdiction of the Bishop of each diocese ; [2]

(2) The obnoxious 16th section, by which gifts of real property, executed within three months of the testator's death, were made void.[3]

3. In his speeches at these meetings, he brought forward a number of new objections of a more or less vague description.

[1] See pp. 18-23.

[2] For the answer to this charge see pp. 37-39.

[3] The 16th section, as is obvious, is a great blot upon the Act. But it lies, not with the Bequests Commissioners, but with the Judges, to put that section in force.

What happens in the case of a will, otherwise valid, but containing an invalid bequest is as follows :—

1. The invalidity of the bequest will not hinder the granting of probate of the will.

2. Probate having been granted, a legal right to the gift invalidly bequeathed is automatically acquired by the residuary legatee or by the residuary devisee, according as it is a gift of personal or of real property ; and if the testator has made no provision for the disposal of a residue, the right to the gift, if it is a gift of personal property, is acquired by the testator's next of kin, or, if it is a gift of real property, by his heir-at-law.

3. But the person by whom the right to the gift invalidly bequeathed is thus acquired may, of course, if he wishes to do so, apply the gift, or direct it to be applied, as a gift from himself to the purpose to which it was invalidly bequeathed by the testator, thus giving effect to the testator's intention.

4. Cases not unfrequently occur in which some point arises as to whether a particular bequest is or is not, invalid, whether by reason of the 'three months clause' of the Bequests Act of 1844, or of the penal sections of the 'Emancipation' Act of 1829, or on any other ground. Such cases are dealt with by a judicial decision in a court, and do not come before the Bequests Commissioners in any way.

They were the following :—

(1) He objected to the principle of the Bill : '*no amendment of it*,' he said, '*will satisfy me.*' And, as he explained, by the principle of the Bill he meant 'the principle of connecting the Catholic Church in any way with the State,—the principle that would send our Catholic Commissioners, whoever they may be, to the Castle.' [1]

This had reference mainly to those Bishops who might be appointed members of the new Commission, and notably to the Archbishop of Dublin, Dr. Murray. The following passage of the same speech is worth transcribing :—

I don't want to go to the Castle with our religion (cheers). I have the strongest abhorrence of Castle religion.[2] I do not like to see the most venerable and venerated of our clergy there, even for a passing moment (hear).

No man holds in higher veneration than I do the apostolic prelate,—the really apostolic prelate,—who presides over this archdiocese; he is venerated by every person who knows him. I feel towards him the most affectionate veneration, I would say, if that did not appear to be too familiar a phrase to use in reference to one in his high station. Assuredly no one can deserve more of veneration and admiration for his conduct during his long reign than Dr. Murray; but still I do not like even to see Dr. Murray at the Castle (hear, hear).[3]

[1] See the reports of O'Connell's speech at St. Michan's, in *The Freeman's Journal* or *The Pilot* of December 4th, 1844.

[2] It would be interesting to know what precise meaning O'Connell attached to the peculiar expression 'Castle religion.'

[3] In his speeches against the new Act and its Commissioners, O'Connell assumed that the Act was to be worked as a part of the Castle system of administration in Ireland,—the meetings of its Commissioners being held in the Castle, where there would be abundant opportunities of secret conferences on many important topics between the Castle authorities and individuals, especially individual Bishops, amongst the Commissioners.

But the Bequests Board does not meet in the Castle, and apparently never met there. (See p 121, n. 4.) Nor does 'the Castle,' in any sense of the word, exercise even the faintest influence on the Commissioners in their work.

Unfortunately for O'Connell's consistency, he did not, during some years of his once splendid public career, display very great

(2) A special reason why O'Connell objected to the connection with the Castle, which he considered would be brought about by the new Act, was that the Bishops,—those who would probably be invited to become Commissioners,—were 'simple-hearted prelates', who would easily be entrapped by the able public men, or, as he expressed it, 'the cunninger persons,' whom they would meet there!

He apparently considered that this view of the case, uncomplimentary as it might be to the Bishops, and even to leading members of their body, was not inconsistent with the language of fulsome eulogy in which he at times spoke of the Bishops, both individually and collectively.

We have just now seen one specimen of the style in which he habitually, and no doubt sincerely, expressed his veneration for Dr. Murray. In the same speech we find another:—

> We want the countenance of our bishops and clergy in order to obtain for Ireland the restoration of her ancient right to legislative independence (hear). . . . I could not go on without it. . . . As long as I enjoy it, I have confidence in myself, and am sure that I am not doing anything wrong or morally reprehensible. . . . .
>
> I even find security in the conduct of those among them who do not speak [in favour of the Repeal movement], as well as in the conduct of those who have openly proclaimed their opinions.
>
> Dr. Murray is an example of this. That venerated pre-

anxiety to keep his lay followers and friends clear of contact with the 'Castle' in the political sense of the word.

The so-called 'Lichfield House Compact' of 1834 between him and the Whig Ministry of the time may have been nothing more than a friendly understanding that he would use his great political influence to keep the Whig Government in office, and that they would carry out certain reforms then urgently needed in Irish legislation and administration,—an understanding based, not upon any formal agreement, but upon mutual goodwill.

But goodwill, supposed to be mutual, is not always so in reality. And if examples are needed to show the weakening effects of reliance on such 'compacts' or 'understandings,'—especially when they are propped up by the exercise of Government patronage,—they are to be found in the history of more than one political movement in Ireland.

late has not committed himself upon this subject [Repeal of the Union]. Still, if we were doing anything grossly wrong,—anything which tended to the violation of the law, or to the commission of crime,—would he have celebrated, as he did (the blessing of Heaven upon him for it!), the triumphant announcement of our escape from the iniquitous judgment? Would he proclaim that triumph in the temple of the living God, and at the solemn sacrifice of His blood (loud cries of hear, hear)? Oh, no, he never would have done so (hear, hear).[1]

And again, in the same speech:—

I regard with feelings of the deepest veneration the sanctified prelate who for so many years has been the ornament and the dignity of this archdiocese.

No man holds him in higher reverence than I, and no man would with greater indignation fling aside any expression that could be considered derogatory in the slightest degree to those sentiments of veneration with which he deserves to be regarded.

I do not battle with Dr. Murray (God forbid), but *I battle for the Catholic Church* (!) [2]

And in another speech of the same series he eulogised the Irish Bishops, individually and collectively, in the following extravagant fashion:—

Until this Bill passed the Houses of Parliament, there was the most perfect unanimity in the Catholic Church in Ireland.

I believe it was the truest, the best regulated, the most attached to religion, the most venerable Church, on the face of the earth.

I do not know that there ever was congregated together a class of men more exemplary, or any which,

[1] The reference is to Dr. Murray's public-spirited action on the occasion of O'Connell's liberation from prison when the sentence of the Court of Queen's Bench in Dublin was reversed by the House of Lords.

By direction of the Archbishop, a High Mass of Thanksgiving was celebrated in the Pro-Cathedral, Marlborough-street, with all the solemnity befitting an occasion of national rejoicing,—the Archbishop presiding at the throne, O'Connell and the Lord Mayor occupying chairs of state, and the religious Ceremonies of the day concluding with the chanting of the *Te Deum,* intoned by the Archbishop at the altar.

[2] See the reports of O'Connell's speech at St. Michan's in *The Freeman's Journal* or *The Pilot* of December 4th, 1844.

taken individually, possessed higher qualifications than the Catholic prelates of Ireland (hear). Take them up one by one, pass them over man by man in your own mind, and you will find that they are *superior to any other class of men of the same sacred calling that ever were congregated together* (!).

When I say this, I do not mean to flatter. *Heaven is my witness* that in giving utterance to this opinion I am merely expressing that which is unfeignedly and sincerely the honest conviction of my soul (hear, hear, and cheers).[1]

But when there was question of bringing all these high qualifications to bear upon the administration of the new Act, a different note had to be struck:—

I know that if *our simple-hearted prelates* are once lured within the precincts of the Castle,[2] the wily serpent will meet the dove, and the conquest will be unequal (hear, and cheers).

I throw myself forward as one of the body-guards of the Bishops.

They will not (I will not say they *shall* not, for that would look like dictation)—but I know they *will* not *join the enemies of our faith* . . .

I call on every Catholic who *reveres his religion*, who *respects his hierarchy*, to join with me (!), and demand in a firm tone the rejection of this abominable Bill (enthusiastic demonstrations of applause).[3]

(3) Another of his grounds of objection to the Bequests Act, on principle, was that the passing of that Act was, he said, the first step towards the establishment of the system which English ministers had more than once sought to foist upon the Catholic Church in Ireland,—the State-payment of the clergy,—a system, of which, as O'Connell truly said in his speech at St. Michan's, 'the Catholic clergy and the venerated prelates of the Catholic Church *have unanimously pronounced their abhorrence.*'

[1] See the report of the meeting in SS. Michael and John's parish, in the same newspapers of December 6th, 1844.

[2] But as to the connection of all this with the administration of the Bequests Act, see p. 49, n. 3.

[3] See the reports of O'Connell's speech at St. Michan's in *The Freeman's Journal* or *The Pilot* of December 4th, 1844.

The reasoning, if indeed it could be called reasoning, by which O'Connell undertook to show that the appointment of Catholic Bishops as Commissioners under the Bequests Act would lead to the State payment of the Irish Catholic clergy, was of a peculiar kind. It is worth transcribing :—

> Let the Bishops once go under this Bill into the Castle,[1] and the first step is taken for making a State provision for the clergy, and for the clergy receiving that Government salary which they at present disdain (hear, hear).
>
> They may be called to the Castle under the pretext of some business, and when they are there, the observation may be made,—'Oh, we will bring in a Bill, and take the diocese of Tuam, or the diocese of Ardagh, and only give such a sum there.'
>
> They may say, 'we want no control over them.' But I say, let them once begin giving the money, and they will find some persons who get the money exceedingly anxious to be controlled (loud cries of 'hear').
>
> I never knew any person who was getting Government money who did not seek to excuse himself for his dishonesty by becoming zealous in the cause he was paid for joining (hear).[2]

So far for the two or three Bishops upon whom, as Commissioners, the task would devolve of bringing their episcopal brethren throughout Ireland to approve the system of State payment of the clergy, a system of which, as O'Connell himself recognised, they had '*unanimously pronounced their abhorrence.*' As to how the feat of bringing about such a change of opinion was to be accomplished, O'Connell gave no explanation, and apparently assumed that none was required.

To persons not well acquainted with the history of the time, it may seem incredible, in view of O'Connell's reference to the efforts formerly made to introduce into Ireland the system of State payment of the Catholic clergy, that he had

[1] See p. 49, n. 3.

[2] See *The Freeman's Journal* and *The Pilot* of December 4th, 1844.

himself been a prominent supporter of Sir Francis Burdett's Catholic Relief Bill of 1825, which embodied a detailed system of State payment of the Catholic clergy of Ireland![1]

(4) Another ground on which O'Connell protested against the new Act was that it was wholly unnecessary: it served no useful purpose: no one wanted it: Catholic charities were amply protected by the existing laws: had he not himself, as counsel, carried successfully through the Court of Chancery several cases in which property to a very considerable amount bequeathed for Catholic charities was in question?[2]

(5) He did not, of course, deny that the provisions of the 15th section enabling property to be held in perpetuity for certain legally charitable purposes,[3] was a useful one. But he pointed out that those provisions fell far short of the provisions of the Bill which he had introduced into Parliament,[4] but which, he complained, had not been supported by the Government, and had consequently failed to pass into law.[5]

(6) There was also, he said, a consideration personal to himself that should not be overlooked. Was no account to be taken of the way in which he had been treated by the Peel Ministry? Had they not repealed

[1] See, for instance, Mgr. Ward's valuable history of the period (*The Eve of Catholic Emancipation*), vol. iii. pp. 125, 126; *The Life and Times of Daniel O'Connell.* By W. Fagan, M.P. Vol. i. pp. 380, 382–398, 402–406, 430, 438; and W. J. Fitzpatrick's *Correspondence of Daniel O'Connell,* vol. i. pp. 106, 114, 115.

See also Appendix N. on O'Connell's evidence before the House of Lords Committee of 1825.

[2] Surely O'Connell did not consider that no importance was to be attached, for instance, to the abolition of the old Bequests Commission of 1800 (see pp. 3, 4), with its obnoxious power of dealing, practically at discretion, with charity funds assigned by donors to purposes which the Commissioners might deem 'inexpedient'? (See p. 5.)

[3] See pp. 13, 14.

[4] See p. 17.

[5] But O'Connell's criticism of the new Act on this ground was a pointless one: his Bill was, unfortunately, no longer in question.

the Emancipation Act in his case by striking off every Catholic from the jury by which he was to be tried? Is it, he asked, 'at the beck of that Government I am to see Catholic prelates and Catholic laity going to the Castle?'[1]

(7) But the point on which O'Connell in his speeches at those meetings insisted most strongly was of a much more definite character. It had reference to the effect of the Bequests Act of 1844 upon the property of the religious Orders prohibited under the Catholic 'Emancipation' Act of 1829.

Here he set out from the statement that the Commissioners appointed to administer the Act of 1844 would be bound, under its 12th section, to 'recover' and '*apply to other purposes*,' legal and charitable, all 'misapplied' charitable gifts. Thus, he proclaimed, it would be the duty of the Commissioners to recover and apply to other purposes all property bequeathed to any of those Orders, *such property being, in point of law,* '*misapplied.*'

Surely, he insisted, no Catholic Bishop would undertake duties involving an obligation to take part in the odious work of sacrilegious plunder.

At the stage that we have now reached in tracing the history of the agitation, this last became the point of leading importance in the case.

XII.—*The First of the Public Meetings of Protest in Dublin.*

The first of the public meetings in Dublin in opposition to the Bequests Act was held in St. Michan's parish on the 3rd of December, 1844.[2]

In O'Connell's speech at this meeting several points claim special notice.

[1] See p. 49, n. 3.

[2] For the report of this meeting see *The Freeman's Journal* of December 4th, 1844, or *The Pilot* of the same day.

The first is a declaration of his dutiful attitude towards ecclesiastical authority. He began his speech by expressing his 'devoted submissiveness' and 'unequivocal submission' to the authority of the Church, first to the Head of the Church, and then to the Hierarchy in its different orders and according to its different rights.

But this, he went on to say, did not apply at all to the Bequests Act. Upon that Act, he said, the Bishops at their meeting, had not come to any decision. 'They have only to decide upon it,' he continued, 'and they close my mouth,—they have only to determine, and I respectfully obey.'

And all these edifying professions of dutiful submissiveness in the abstract were received by the meeting with every mark of approval.

It must not, however, be overlooked that O'Connell's statement of 'devoted' and 'unequivocal' submission, thus made at the meeting at St. Michan's, was qualified by him, as follows, in his speech at the meeting in the parish of SS. Michael and John, the second of the series of public meetings of protest against the Bequests Act in Dublin.

In that speech he said :—

> I have already proclaimed in another place, at the last meeting I attended, the principle by which my conduct is guided in spiritual matters when the decision of competent authorities in the Church is in any way involved. . . .
>
> When I addressed the meeting in St. Michan's parish, it might appear from my speech that I considered this a matter purely of a spiritual nature. My speech was addressed only to such part of the Bill as involved spiritualities; but my speech did not imply that there were not temporal matters also involved in the Bill . . . on which I could decide for myself.[1]

As he did not specify the 'temporal matters' to which he referred, it is not easy to see the point of

[1] For the report of this meeting see *The Freeman's Journal* of December 6th, 1844, or *The Pilot* of the same day.

this qualification of his statement at the previous meeting.

The only question that the Bishops had to consider in the matter was whether in the duties of the Commissioners under the Act there was anything that was in conflict with the laws of God or of the Church. Their Resolution declaring that, in their view of the Act, each prelate was 'at perfect liberty to act according to the dictates of his own conscience respecting that measure'[1] showed that in their deliberate judgment there was no such conflict.

With the further question of whether the Act was open to objection in its bearing on temporal matters, as, for instance, whether it put an obstacle in the way of the Repeal of the Union,—as O'Connell, to judge by some of his speeches, seemed to consider that it did,—neither the Resolution of the Bishops, nor the Bishops themselves, as Bishops, had anything to do.

But as to O'Connell's statement that the Bishops had not at their meeting in November come to any decision about the Act, he was altogether misinformed.

Under the Resolutions adopted at that meeting any Bishop who might be nominated to a place on the Commission to administer the Act would be at perfect liberty to accept the nomination if he felt himself free in conscience to do so. Yet it was a favourite topic of O'Connell's in his speeches at public meetings, that no Bishop could discharge the duties of the Commissionership without a grave violation of the canon law of the Church!

Another point to be noticed here is of a peculiar nature. It was put forward by O'Connell to show that the appointment of Bishops as Commissioners would give no real security against the occurrence of abuses in the administration of the Act.

'A law,' he said, 'should be so made that no man

[1] See p. 33.

will be able to administer it badly.' And to illustrate what he had in view in this, he referred at length, and with painful minuteness of detail, to the lamentable 'fall from grace' of a Bishop whom he named,—an Irishman, a Bishop of a colonial see;—'a right reverend friend of mine,' he said, 'for whom I have a great affection, even in his errors and misfortune I have an affection for him still, the Right Rev. Dr. ——.' And at this point he named the unhappy man, though what necessity there was for doing this at a public meeting it is not easy to see.

Then he continued:—

> If when Dr. [again naming him] was last in Ireland . . . anybody had objected to his being on a Commission such as this, the objector would have only exposed himself to odium, and everyone would have asked him why he presumed to oppose the admission of such a man.

Keeping the unfortunate victim of his oratory still gibbeted before the meeting, he went on to suppose the case of his 'right reverend friend' having been nominated to the Commission of Charitable Bequests, and of his having afterwards, as O'Connell significantly expressed it, 'notwithstanding the purity of his previous life, misconducted himself, as unhappily he has since done, for which he has been removed by the Pope.' Could it, he asked, be expected that such a Bishop would discharge his duties with a due regard to the interests of the Church? Yet,—

> He was made a Bishop by reason of his good conduct, and so unsullied was his character that he was just such a man as you would wish to see on a Commission if we were to have a Commission at all.
>
> Oh, sir, I do solemnly assure you that it goes to my heart to be obliged (?) to enter into these details.

The natural inference from all this, of course, was that no Bishop,—apparently not even Dr. Murray himself, the 'really apostolic prelate,' whom O'Connell held in such 'affectionate veneration,'—should be entrusted with a place on the Board.

After this unpleasant interlude came a reference to the former agitation against the Veto.[1]

This was meant by O'Connell to bring home to the Catholic laity how important it was that they should hold their ground against their Bishops, and how easily, too, this could be done.

Looking back to a time when acquiescence in the concession of the Veto or opposition to it was an issue as prominent in Ireland as was acquiescence in the Charitable Bequests Act or opposition to it at the time when he was speaking, he said :—

> Well, we battled against the Veto. The Bishops assembled in their Synod.[2] . . . We thought to obtain from them a declaration against [the Veto], but for a considerable time we were doomed to disappointment.
>
> At length, however, the popular voice was heard, and heard, too, in tones that could not be mistaken. People cried out, 'We will have no *Soggarth Sassenaghs*,—we will have no Bishops made by an English Pope.' The shout resounded from one end of the island to the other (hear, hear). People of Ireland, *you have the same remedy now* (loud cheers).[3]

The reference to the agitation against the Veto suggested a reference to the 'Emancipation' Act of 1829, and, as to this, O'Connell deplored that—

> Unfortunately, in carrying the Emancipation Act, we left one limb of the Catholic clergy in slavery.
>
> We left the regular clergy with a clause in that Bill which made their existence in Ireland illegal.[4]

[1] It can hardly be necessary to explain that the Veto,—once a matter of leading importance in Ireland,—was a power sought for by the Crown to control appointments to Irish bishoprics by excluding from appointment ecclesiastics objected to by the Crown, that is to say, by the Ministers of the day.

[2] See p. 31, n. 1.

[3] It would be out of place here to do more than simply protest against the travesty of facts regarding the Veto agitation, by which O'Connell here sought to prop up his groundless case against the Bequests Act.

[4] At the second of the meetings in Dublin, O'Connell expressed himself much more fully on this point :—

'The Emancipation Bill prohibited any more the existence of regular clergy in Ireland, and I admit it was a base thing of us to consent to connect our emancipation with that clause.

'I regret, and deplore it. . . . Our emancipation was but a left-

In these references to the legislation against the regular clergy, O'Connell was leading up to a point which it was of vital importance to him to establish, with a view to ensuring, as he strove with all his energy and all his powers of advocacy to ensure, that no Bishop would undertake the office of Commissioner :—

> See (he said) in what a melancholy position the Catholic prelate is placed who becomes a member under the Commission.
>
> The principle of the new Charitable Bequests Bill declares that all properties devised to friars are 'misapplied' charities (hear). Regarding them as such, it is the bounden duty of the Catholic Commissioner [the reference is to the 12th section of the Act] to bring them in.[1] If he refuses to do so, he may be indicted for a neglect of duty, and turned off to make way for persons of a disposition more pliable and more complaisant.
>
> The duty is one imposed by Act of Parliament, and therefore he may be compelled by a Mandamus to discharge it. But while he is bringing in the so-called 'misapplied' charities, how can he exclude from his own mind the reflection that he is *robbing the friars of all their property* ? (hear).
>
> And now I put it to the Catholic prelates and to the Catholic laity, will they be Commissioners under an Act which will compel them to look upon the property of the friars as 'misapplied' charities ? (hear).

This, however, is a matter specially dealt with in a professional Opinion given by O'Connell to the heads of the religious Orders in Dublin, and it will be considered apart in the next section.

handed emancipation as long as our people are prevented from serving God in the manner they think most perfect and most useful.

'*We should not have consented to the introduction of such a clause.* It was *a sacrifice we should not have made.* It is one we should redeem as soon as we can by calling upon the Government to do justice to the regular clergy' (loud cries of hear, hear).

See *The Freeman's Journal* of December 6th, 1844, or *The Pilot* of the same day.

[1] See p. 55 (7).

XIII.—*O'Connell's Second Professional Opinion on the Bequests Act; impending* '*Plunder of the Religious Orders.*'

On the 5th of December, two days after the meeting in St. Michan's, O'Connell's second professional Opinion on the Bequests Act was published.[1]

This Opinion had been obtained about a week before by the heads of the various religious Orders in Dublin. They were naturally alarmed by rumours that were afloat as to the effect of the new Act upon their property. And they were no less naturally anxious to obtain, if possible, a reassuring statement on the point from the one adviser upon whom, both for his legal knowledge and for his practical skill in dealing with all legal matters, they, in common with the overwhelming majority of the Catholics of Ireland, relied with unwavering confidence.

The Opinion dealt with two points.

One regarded the legal duty of the Commissioners under the new Act, in reference to bequests or other gifts, made to, or in favour of, any of the Orders prohibited under the 'Emancipation' Act of 1829.[2]

The other point considered in the Opinion was as to whether the Act of 1844 rendered void a gift made to, or in favour of, *an individual member, or individual members*, of one of those Orders.

The following are the paragraphs of the Opinion that relate to the first of those points:—

Perhaps the very worst feature in this last statute . . . is that it places the Catholic Commissioners (if any

[1] See *The Freeman's Journal* of December 5th, 1844, or *The Pilot* of the following day.

[2] It may be useful to quote here, once for all, the words of the 'Emancipation' Act defining the religious bodies which it prohibits and consequently penalises. These are,—'religious orders, communities, or societies of the Church of Rome, bound by monastic or religious vows.' For the various religious bodies thus indicated in detail, it will suffice in these pages to use the one word 'Orders.'

Catholic accepts the office) in direct antagonism with all the regular clergy.

It makes it the duty of every Catholic Commissioner to sue *for the recovery* and *application to other purposes* of all charitable property withheld or *misapplied*. Now the charitable property of the regulars is, in point of law, *misapplied*, and every Catholic Commissioner is, in discharge of his duty under this Act, *bound to take away from the regulars their property* and *apply it to other purposes*.

In other paragraphs of the Opinion, O'Connell called attention to an 'additional disadvantage,' caused, as he represented, by the constitution of the Bequests Board under the new Act. Under the Act of 1800, the Commissioners,—at first, all of them, and to the end, practically all of them,—were Protestants;[1] and, said O'Connell, they 'had no means of knowing, or at least of proving, who was, or was not, a regular.' But, he went on to say,—

Should there be a Catholic Bishop amongst the new Commissioners, that Catholic Bishop will of course know every regular in his diocese, and it will be his duty under the Act *to get into possession of the funds of every kind of such regulars*, and to apply the same *to other charitable purposes*, that is, to charitable purposes recognised by our law.

According, then, to O'Connell's view of the Act, it would be a most serious disadvantage to the regular clergy that any Catholic Bishop should be a member of the Commission.

The second point dealt with in this Opinion was as to the legal position of gifts to *individual members* of the prohibited Orders. On this point, O'Connell, in his speech at the first of the meetings of protest held in Dublin against the Bequests Act, said :—

There were [under the Act of 1829] means of vesting *in a single friar* property *for the use of the community* . .

It was *the community* that was referred to in the Act, and *not one individual friar ;* and this being the case, it

[1] See pp. 6, 7.

was quite possible to vest a sum of money *in an individual friar in trust for the community*,[1] although it would not be legally possible to invest it in the community at large.[2]

And, in the Opinion which we are here considering, he explained more fully his peculiar view of the law upon this point, as follows:—

> The result of the Emancipation Statute rendered, by necessary implication, any charitable donation in favour of any religious *community of men* in its nature void in point of law. But a donation for charitable purposes, *vested in a single regular*, was,—before the statute of the last session [that is to say, before the Bequests Act of 1844],—in my opinion, valid.
>
> The question is one of some doubt, but my opinion is favourable to *the capability of a single regular* to take a donation in land or money, *for charitable purposes* before the Act of the 7th and 8th Victoria, chapter 97 [that is, before the Bequests Act of 1844].
>
> I may be mistaken in this view of the law pre-existing that statute; but I am not mistaken in saying that, since that statute,—that is, at present,—not only no community of regulars, but *no single regular, can take or enjoy any species of property*, either in land, houses, or money, *for the support of the Order* or of any portion of the Order.

Without anticipating what will afterwards come to be dealt with in detail, it may be pointed out here that there is a curious and very misleading element of confusion in the statement of law in the preceding paragraphs.

There is no longer any doubt,—if indeed it was at any time doubtful,—that under the Act of 1829, money or property of any kind could, as O'Connell was inclined to hold, be vested in an individual member of a prohibited Order for any *charitable* purpose, or indeed for any *lawful* purpose, charitable or non-charitable.

[1] This, of course, would not be possible. The community being, under the Act of 1829, an illegal body, no valid trust could be created in its favour.

[2] See the report of the speech in *The Freeman's Journal* of December 4th, 1844, or *The Pilot* of the same day.

But from this it by no means follows that, under the Act of 1829, property could be vested in a member of a prohibited Order *for the use or benefit of the Order itself.* Any such Order being, by reason of the prohibition, illegal, no valid trust could, since the Act of 1829, be created in its favour, and, consequently, no property of any kind, to be held for its benefit, could validly be vested either in one of its members, or in any other person or persons whatsoever.

O'Connell, as we have seen, held that such a trust would be invalid. But, in his view of the law, this invalidity was the result, not of the 'Emancipation' Act of 1829, but of the Bequests Act of 1844, which, he maintained, had thus subjected the regular clergy to a new disability.

What he relied on in support of his view was the Proviso at the close of the 15th section of the Act. This was as follows:—

> Provided always that *nothing herein contained shall be construed to render lawful* any donation, devise or bequest to, or in favour of [any of the religious Orders prohibited under the 'Emancipation' Act of 1829], *or to, or in favour of, any member or members thereof.*[1]

This, no doubt, seems only to secure that nothing in the Bequests Act of 1844 should be construed as rendering lawful any gifts that were unlawful under the Act of 1829. But, said O'Connell, the Proviso does more than this. It expressly mentions, as gifts that are *not made lawful by this Act of* 1844, gifts to, or in favour of, *any member or members* of these Orders. This, he said, is equivalent to 'a distinct legislative declaration or definition' that such gifts are unlawful; for if not, what would be the meaning of the statement that this Act is not to be taken as rendering them lawful? To put this in his own words:—

[1] See p. 14 (6).

That Provision contains *a distinct legislative declaration or definition*; and *all our courts of law and equity* would consider themselves *bound to carry it into effect* by judgment or decree ruinous to the regular clergy.

He did not, of course, ignore the provision in the 22nd section of the Act of 1844,[1] which enacts that,—with one specified exception,[2]—

Nothing herein contained shall be taken to [make void][3] or render unlawful any donation, devise, or bequest, which, but for this Act, would be lawful.

This would seem to be decisive against his view that gifts to individual members of the prohibited Orders,—gifts admittedly valid before the enactment of this Act,—were made void by the Proviso in its 15th section. But he maintained that those words only meant that no *express enactment* of this Act was to be taken as making void or unlawful any donation, devise, or bequest, which, but for this Act, would be lawful. And this being so, he inferred that they did not hinder a donation, devise, or bequest from being made void or illegal by the *legislative declaration or definition* on which he relied.

The concluding paragraph of the Opinion was but the natural conclusion from all that had gone before:—

This is a fearful state of things to contemplate, and it strikes me that *the prelates, clergy, and people* should combine to repudiate this new Act, and to *join in one universal and manly call* on the Government *to repeal the recent statute*, and to recognise, in law and in fact, that most useful and exemplary body, the regular clergy of Ireland.

[1] See p. 15 (8).

[2] The one exception is that enacted in the 16th section of the Act, making donations, devises, or bequests of real property for charitable purposes void unless they are executed or registered within the time specified in that section. See p. 14 (7).

[3] The words of the Act are, 'to *avoid*.' See p. 15, n. 1.

XIV.—*The second Public Meeting of Protest in Dublin: a not over frank admission of a grave mistake.*

On the day on which O'Connell's second professional Opinion on the Bequests Act was published, the second of the series of public meetings in opposition to the Act was held in Dublin. It was a meeting of the Catholic inhabitants of 'the United Parishes of SS. Michael and John.'[1]

O'Connell was, of course, the principal speaker, and he was emphatic in his warnings to all Catholic ecclesiastics, and most especially to the Bishops, regarding the awful position in which they would find themselves, if they were so misguided as to take a responsible part in the working of the Bequests Act. The property of the religious Orders, being 'misapplied,' would be plundered, and it was, he said, the ecclesiastics, and more especially the Catholic Bishops,—if unhappily there were Catholic Bishops amongst the Commissioners,—who would be held responsible by the public for the disgraceful plunder.[2]

The chief point, however, that calls for particular notice in O'Connell's speech on this occasion had reference to a different matter, the power over charitable bequests,—'formidable' and 'dangerous,' as O'Connell in his first professional Opinion had described that power to be,[3]—with which the Bequests Commissioners are invested by the Act of 1844.

[1] For the report of this meeting, see *The Freeman's Journal* of December 6th, 1844, or *The Pilot* of the same day.

[2] Afterwards, in his speech at the meeting of the Catholic parishioners of St. Audoen's, held on the 17th December (see p. 82), O'Connell put this point more explicitly as follows :—

'The effect of this law upon the friars is too obvious to be denied. 'The friars must inevitably be robbed and plundered under its provisions; and when we complain, Protestants will turn upon us, not without good cause (!) and say, "Blame your Catholic Commissioners, —it is they who are doing it all."'

[3] See pp. 18-20.

In considering the various points of O'Connell's first Opinion we have seen that the power in question could in no way be described as 'formidable' or 'dangerous,' since it was nothing more than *a power to set the Courts in motion* for the recovery of charitable gifts, 'withheld, concealed, or misapplied.'[1]

O'Connell himself had now at length come to see that this was so. In the opening sentences of his speech at this meeting, he said :—

At one time it was supposed,[2] and I myself entertained the notion until I looked into it narrowly (!), that the Protestant Commissioners of Charitable Bequests[3] had in themselves direct dominion over Catholic charities. (Hear and cheers.)

I found, however, that the words of the section were *totally defective*[4] that gave them *any jurisdiction whatever except the choice of going to law.*

Here we find withdrawn by O'Connell himself one of the charges on which he had most strongly relied in his first denunciation of the Bequests Act.

Another point that may be noticed here is one that gives further evidence[5] of O'Connell's having been seriously misinformed as to what had been done by the Bishops at their meeting.

Speaking of that meeting he said that fifteen, and therefore a majority, of the Bishops had declared

[1] On the meaning of 'misapplied,' as it occurs in the 12th section of the Act of 1844, see pp. 79, 80.

[2] It may fairly be asked : 'Supposed by whom,' besides O'Connell himself ?

[3] It was not unusual with O'Connell, in speaking of the powers of the Bequests Board, to speak of them as exercised by the Protestant Commissioners, who formed the majority of the Board. See p. 18.

[4] Thus O'Connell,—having at length discovered that the 'formidable and dangerous power,' of the results of the exercise of which by the Commissioners he had given so alarming a forecast (see pp. 18-20), was simply non-existent,—accounted for its absence by alleging that the section giving powers to the Commissioners was defective !

[5] See p. 57.

'unequivocally' against the Bequests Act. And he then added :—

> The minority *have not submitted to this decision.* I regret it. From my soul I regret it.

No plainer proof could be given that his informant had misled him. When he spoke of a decision to which a minority had not 'submitted,' he was evidently misinformed as to what the decision was.

The decision in reference to the Act was that every Bishop was left 'at *perfect liberty*' to act in reference to it, 'according to the dictates of his own conscience.'[1] Now the only evidence of any failure to submit to this decision was, that vigorous and determined efforts undoubtedly were made, by means of stormy agitation and otherwise, to hinder Bishops from acting 'according to the dictates of their consciences' by becoming Commissioners, or continuing to be Commissioners, under the Act.[2]

XV.—*Interview of Dr. Murray with the Lord Lieutenant and the Chief Secretary: an 'amiable and too confiding prelate': Letter from his Grace.*

Having obtained from O'Connell his professional Opinion on the bearing of the Bequests Act upon the religious Orders, the representatives of the Orders had the Opinion brought to Dr. Murray by leading members of the regular clergy in Dublin.

It would not, of course, have been at all easy for anyone who was not a lawyer to displace O'Connell's confident statement that, as a matter of legal construction, it would be the duty of the Commissioners, —including any Catholic Bishops who might have accepted the office,—to take away the property of

[1] See p. 33.

[2] See, for instance, on pp. 72, 73, n. 2, the letter of the Bishop of Killaloe.

the regular clergy, and apply it to 'other' purposes, lawful and charitable according to English law.

The Archbishop was placed by O'Connell's Opinion in a position of no little embarrassment. But he at once took the prudent and practical step of obtaining an interview with the Lord Lieutenant (Lord Heytesbury) and the Chief Secretary (Lord Eliot) in reference to the formidable-looking difficulty that O'Connell had raised.

No opinion that either Lord Heytesbury or Lord Eliot might express as to the construction of the Act could, of course, have any legal effect. But if they could give the Archbishop an assurance that it was contrary to the intentions of the Government, in carrying the new Act through Parliament, to bring about the results which O'Connell so confidently affirmed had been brought about by it, such an assurance would be of decided advantage.

For in that case those Catholics,—or, at all events, those Catholic Bishops, Dr. Murray amongst them, —who had been invited, and had consented, to become Commissioners, would find themselves in the strongest possible position to insist on the Act being amended in accordance with the assurance that had been given to them. And in the event of faith not being kept with them, and of the promised amendments not being made, they would be free, and indeed bound, to withdraw in protest from the Board,—their withdrawal in such circumstances being so serious in its effect upon public opinion as to make it certain that the case would not be allowed to arise.

The result of the Archbishop's interview with the Lord Lieutenant and the Chief Secretary was satisfactory. They were not content with merely expressing their personal belief that O'Connell's exposition of the Act as regarded the religious Orders was erroneous. They furthermore assured the Archbishop

that nothing could have been farther from the intentions of the Government than to interfere in any way with the position of the regular clergy as it existed before the passing of the recent Act.

Not being themselves lawyers, they could only undertake, as they did, that before any further steps were taken to bring the Act into operation, a case would be made out for the Opinion of the Law Officers, and that, if it should be found that there was anything in the Act to justify the alarm raised by O'Connell, a legal remedy would at once be applied.

Without delay Dr. Murray made known to the representatives of the religious Orders the result of this important interview, and his letter was at once published in the newspapers by the clergyman to whom it was addressed,—the Very Rev. Dr. Spratt, then, and for many subsequent years, a prominent member of the community of Carmelite Fathers attached to the Church of the Order in Whitefriar-street.

The following is the Archbishop's letter :—

My Dear Spratt,

I took Mr. O'Connell's legal Opinion to the Park yesterday, and had an interview with the Lord Lieutenant and Lord Eliot on the subject of it.

They promised to have a regular case made out and submitted to the Crown lawyers, together with Mr. O'Connell's Opinion.

They declared that it was not by any means the intention of the framers of the Charitable Bequests Act to impose any new restriction on Religious Orders, and Lord Eliot assured me that if it should be found that the Act would have that effect, measures would be taken to apply a legal remedy.

I remain, my dear Spratt,

Yours very faithfully,

✠ D. Murray.[1]

[1] See *The Freeman's Journal* of December 6th, 1844, or *The Pilot* of the same day.

The comment of *The Freeman's Journal* on this notable incident was, on the whole, moderate; but it did not let pass the opportunity of referring to Dr. Murray as 'an amiable and too confiding prelate.'

The Pilot, as might have been anticipated, blazed up in indignation :—

> They [the Lord Lieutenant and the Chief Secretary] said they would lay a case before *their own counsel*, and act upon their opinion.
>
> The Bill had been already submitted to *the first counsel in the land*, and his Opinion, than which *there can possibly be no better*, proves it to be a downright penal Bill.
>
> Is it to be supposed that Mr. O'Connell, *confessedly the first law opinion in Ireland*, is mistaken himself with regard to it; or shall we, with the organs of Orange folks and Castle folks, believe that he is wilfully misleading the people? [1]

To the editor of *The Pilot* the first of these alternatives was wholly incredible, as, of course, was the second.

XVI.—*The Third Public Meeting of Protest in Dublin; the Archbishop's Interview with the Lord Lieutenant and the Chief Secretary a source of amusement.*

On the day on which the Archbishop's letter was published, O'Connell held the third of his public meetings in Dublin. This was a meeting of 'the Catholic inhabitants of the United Parishes of SS. Nicholas Without, Luke, and Bridget, with the Bishop's and Dean's Liberties.' [2]

Except in one respect, O'Connell's speech at this meeting gave no indication that he was at all disconcerted by the Archbishop's letter.

He began with a note of exultation.[3] He had

[1] *The Pilot*, 6th December, 1844.

[2] See p. 46.

[3] For the report of this meeting, see *The Freeman's Journal* of December 7th, 1844.

good news to announce. He had it on unquestionable authority that the Right Rev. Dr. Kennedy, Bishop of Killaloe, one of the three Bishops whose acceptance of a Commissionership had been confidently counted upon by the supporters of the Bequests Act, had 'totally declined taking part under this Bill'[1]—an announcement naturally greeted with cheers.

Dr. Kennedy, O'Connell's hearers were reminded, was no ordinary bishop: the Irish Church did not contain 'a more intelligent, a higher informed, a more pious, a more exemplary prelate, nor did it contain a man of more powerful and energetic turn of mind': in addition, he was 'a decided enemy of the continuance of the nefarious Union (cheers), so that,' said O'Connell, '*he has every quality that can adorn a prelate.*'

This was followed by a fervent expression of hope that 'other revered and exemplary prelates' would follow the example of Dr. Kennedy,[2]—a hope expressed

[1] The following is the very misleading account of Dr. Kennedy's resignation of the Commissionership, given in the Life of Dr. MacHale more than once referred to in the preceding pages:—

'The two Archbishops of Armagh and Dublin, with Dr. Kennedy, Bishop of Killaloe, accepted seats on the Board of Commissioners. . . .

'Dr. Kennedy, however, *felt his place rather uncomfortable, and withdrew,* the Bishop of Belfast taking his place. (See *The Life,* vol. i. p. 562.)

Now, as to Dr. Kennedy, the fact is that he never took a place in the Boardroom. He had resigned the Commissionership before the 7th of December, 1844 (see his letter below), and the Bequests Act did not come into operation until the 1st of January, 1845.

The appointment of the 'Bishop of Belfast,'—that is to say, of Dr. Denvir, Bishop of Down and Connor,—was made some weeks before that date: his appointment was officially announced in *The Dublin Gazette* of the 18th of December, 1844.

[2] If O'Connell had known anything of a letter that is preserved in the Dublin Diocesan archives, he would hardly have spoken as he did of the Bishop of Killaloe, and of his resignation of the Commissionership.

On the 7th of December, 1844, Dr. Kennedy wrote:—

'My Dear Lord,

'Having on my arrival at home found that *a violent storm had been raised against me* on account of my acceptance of a place on the "Board of Charitable Bequests," after having *struggled in vain*

with special reference to the consoling fact that 'this diocese of Dublin' was then 'blessed with one of the most venerated and respected of the hierarchy, the Most Rev. Dr. Murray.'

But, interesting as all this may have been, there must have been amongst those present some anxiety to know what was to be thought about the Archbishop's letter, published in that morning's newspapers.

O'Connell, facing the difficulty boldly, read the letter for the meeting, and then proceeded to dispose of its contents by a characteristic piece of banter, jeering at the Lord Lieutenant and the Chief Secretary because they had not undertaken on the spot to give a legal opinion in opposition to his:—

There is one thing clear about it, that Lord Heytesbury and Lord Eliot don't know what they themselves have done. For when the Archbishop begs to ask if my opinion be right or wrong, they say they will ask *some person else* about it. It is really ludicrous. They (!) have passed this Act of Parliament, yet they don't know its meaning. They are stuffing it down our throats without themselves knowing what it means; and they are obliged to call upon *other wiseacres to tell them what they themselves have been doing* (hear, hear)!

'What are you doing there, Tom?' 'Nothing, please your honour.' 'What are you doing there, Harry?' 'Helping Tom, sir' (laughter). Lord Eliot—'Why have

against it for several days, *I found myself at length obliged to give way to it*, and on Sunday I wrote to Mr. Blake [the Treasury Remembrancer for Ireland] resigning my Commission before it was made out, and stating my reasons for the determination I had *so very reluctantly come to* . . .

'*It is not that my opinions on the Bill have been shaken in the slightest degree*, but because the unexpected presence at the Limerick Banquet of [a person named], and his insinuations in his speech on the occasion, coupled with my absence from it,—and I was expected to attend it,—created *so violent a feeling against me throughout this and the neighbouring counties*, as, I fear, will not speedily be removed. . .

'I have the honour to be, My dear Lord,

'Your Grace's faithful servant,

'✠ P. Kennedy.'

the Parliament passed this measure?' 'Oh, I know nothing about it.' 'Who advised you?' 'The Attorney-General.' 'What does he say?' '*He knows nothing about it*' (laughter).[1]

It is very curious, to be sure, that they did not know whether the Bill had a tendency to injure the Regular Clergy or not (hear, hear). *How little adapted is Dr. Murray to contend against men of this description* (hear, hear).

And as to Dr. Murray, O'Connell continued :—

With his openness of heart,—his direct fairness of disposition and the impossibility of his deceiving any person,—how little he thinks it possible that they should think of misleading him (hear, hear).

One of the reasons why I should not like to see our clergy going to the Castle is this,—that they will there meet with cunninger persons than themselves.

It is hardly possible that O'Connell's wonted self-confidence was not somewhat disturbed by the information conveyed to the public by the letter of the Archbishop published that morning. But nothing in his speech gave any indication of this, except that, as regards the number and variety of the subjects upon which he touched, the speech was of a decidedly discursive character.

There was, of course, the usual confident assertion that the property of the friars was to be plundered by the Bequests Commissioners, with a reference to the legal Opinion which he had given on that subject.[2] Then he spoke of the indefensible action of the Government in not taking up his Bill [3] and passing it through Parliament; of his determination to keep independent of Government for the future until he had a Parliament in College Green; of the crime that the Government had committed against him by imprisoning him as they had done,—'no man,' he said, 'ever had a greater crime

[1] This statement seems to have highly amused the meeting. But obviously it was made by O'Connell without a particle of foundation.

[2] See pp. 61-65.

[3] See p. 17.

committed against him';—of the inutility of their laying a case before their Law Officers, as he could himself tell them beforehand what the 'vinegar cruet on two legs'[1] would say; of the number of Repealers at the meeting, all of whom he called upon to 'hold up their hands' (!); and so forth.

As was but natural, he pleaded earnestly for the repeal of the penal sections of the 'Emancipation' Act of 1829, recounting the many claims of the regular clergy upon the gratitude of the Catholics of Ireland, and dwelling particularly upon the devoted fidelity of their service to the Irish Church in the old penal days of persecution and of martyrdom.

But in all this variety of topics there was no attempt to make good his legal position, the stability of which was so seriously threatened by the assurances given to the Archbishop by the Lord Lieutenant and the Chief Secretary.

Notwithstanding this, the speech closed amidst the usual demonstrations of enthusiastic applause.

XVII.—*A Pastoral Letter of the Archbishop of Tuam.*

In the interval between the third and fourth of the public meetings in Dublin, a fresh element of vigour was infused into the movement against the Act by the publication of a Pastoral Letter of the Archbishop of Tuam.[2]

In this Letter, issued to be read in the churches of his diocese at the beginning of Advent, the Archbishop expressed himself very plainly upon the iniquity both

[1] This was one of O'Connell's favourite ways of describing the Attorney-General who had prosecuted him,—the Right Hon. Thomas Berry Cusack (T. B. C.) Smith,—whom, to the intense delight of his audiences, he sometimes playfully designated, 'A. B. C.' Smith, sometimes 'A. B. C. D. E. F. G.' Smith, sometimes 'Alphabet' Smith, and so on.

[2] The Letter will be found in *The Freeman's Journal* of December 9th, 1844, and *The Pilot* of the same day.

of the new Act, and of those who might be inclined to give it countenance by charging themselves with the responsibility of giving effect, as Commissioners, to so 'execrable' an enactment.

He recounted how attempt after attempt had been made by successive English Governments to undermine the sacred discipline of the Catholic Church. He spoke of the efforts that had at one time been made to obtain for the Crown a right of veto on the appointment of our Bishops,[1] and of the insidious proposals that had been made for the State payment of the clergy.[2] Each of these projects, he said, had found support, not only from some of the laity, but even from some 'venerable prelates of the Church, fond of quiet, too confiding in others, and unable to cope with wily and unprincipled diplomatists.'[3]

And he went on to say that of all the insidious schemes that had yet been proposed 'to change the discipline of the Catholic Church, to corrupt its pastors, to alienate from them the affections of their beloved flocks, and thus to subdue that Church which ages of persecution could not conquer, '*none*' had been '*framed with more elaborate ingenuity than that of the Charitable Bequests Bill*' (!) It was, he said, an 'execrable,' a 'cursed' measure.

Yet, continued his Grace, a rumour is being industriously circulated that 'some *professing Catholics*, nay, *some of the Catholic prelates*, are ready to become Commissioners to carry such a law into execution.' But, 'this,' the Archbishop assured his clergy and people, '*must be a gross calumny on the members of that body.*'

Yet, at the time, it was generally understood that some,—at all events, two,—of his Grace's colleagues in the Irish episcopate, the Primate and the Arch-

[1] See p. 59, n. 1. [2] See pp. 52-54

[3] In all this, the influence of O'Connell's repeated and most unjust references to Dr. Murray is unmistakable.

bishop of Dublin, were about to become Commissioners under the new Act, if indeed they had not then actually accepted the positions.

To us of the present day, such references in a Pastoral Letter must seem scarcely consistent with the requirements of ecclesiastical decorum. But in the Ireland of seventy years ago, matters such as these were not viewed as they would be in the Ireland of to-day. And as regards the essential merits of the case, it must be borne in mind that Dr. MacHale was not without reason to believe that, as the matter was viewed by the Holy See,[1] he was fighting gallantly, and all but single-handed, a hard battle in defence of the rights of the Church,—rights which others, even Bishops, were, he felt convinced, not unprepared to sacrifice.[2]

XVIII.—*O'Connell's Second Professional Opinion on the Bequests Act examined.*

This is probably the most convenient place to examine in detail the second of the two professional Opinions given by O'Connell in reference to the Bequests Act.[3]

It may be observed that in this second Opinion of O'Connell's, as in his first, the Act is referred to with a carelessness singularly out of place in a legal Opinion.

It will be remembered that the main point of this second Opinion was that under the 'Emancipation' Act of 1829, gifts to, or in favour of, religious Orders of men were void; that such gifts, therefore, were, in law, 'misapplied'; and that, consequently, under the 12th section of the Bequests Act, the Commissioners were bound, and could be compelled by law, to recover them from the Orders, and apply them to 'other' purposes.[4]

[1] See pp. 25-29. [2] See p. 44. [3] See pp. 61-65. [4] See p. 62.

Now, the Bequests Act neither obliges nor empowers the Commissioners or anyone else, to apply gifts to purposes other than those to which they were assigned by the donors. And as we shall see a little further on, O'Connell's interpolation of the word 'other,' not only changes the meaning of the 12th section of the Act, but moreover reduces that section to an absurdity.[1]

Again, O'Connell raised the special point[2] that, as regards the constitution of the Bequests Board under the Act of 1844, the position of the Orders and of their property was far worse than it had been under the Act of 1800. For if a Bishop became a Commissioner,—which was made possible by the new Act,—there would then be amongst the members of the Board at least one Commissioner who would know every regular in his diocese, and would consequently be bound to follow up, as legally void under the Act of 1829, every gift made to, or in favour of, any of those regulars.

Now it is plain that, as regards the application of the penal sections of the Act of 1829, it could make no difference if every one of the thirteen Commissioners had personal and official knowledge as to whether each member of the Catholic clergy of Ireland was, or was not, a member of a prohibited Order.

For there was a fundamental flaw in the theory on which O'Connell relied in his effort to frighten off Catholics, but especially the Bishops, from taking part in the administration of the new Act. According to his statement of the case, the duty of putting in force the penal sections of the Act of 1829, and of thus setting aside bequests made in favour of any of the regular clergy as invalid, would devolve upon the Bequests Commissioners. But in this he was

[1] See pp. 79, 80.

[2] See p. 62.

mistaken. With the enforcement of those sections the Commissioners would, as we have seen,[1] have nothing whatever to do.

But, it may perhaps be asked, is it not, as O'Connell pointed out, the duty of the Commissioners, under the 12th section of the Act of 1844, to recover by legal process all 'misapplied' gifts? And are not gifts in favour of a prohibited Order illegal, and therefore 'misapplied'?

Here it is well to have in view the relevant words of the 12th section:—

> The Commissioners . . . may sue for the recovery of every *charitable* donation, devise, or bequest intended to be applied in Ireland, which shall be *withheld*, *concealed*, or *misapplied*, and *shall apply the same*, when recovered, to charitable and pious uses, *according to the intention of the donor or donors.*

This plainly can have no reference to a gift made for an illegal purpose. The only gifts dealt with in the section are gifts which, when recovered by the Commissioners, are to be applied by them, not, as is more than once stated in O'Connell's Opinion, to purposes '*other*' than those assigned by the donor, but '*according to the intention of the donor.*'[2] No direction could be more plainly conclusive against the supposition that the gifts in question were intended by the donor for any illegal purpose.

Or, to put the matter in another way: if a donor's intention had been to devote his gift to the benefit of one of the prohibited Orders, it would be the duty of the Commissioners, first,—if O'Connell's view of the Act were correct,—to recover the gift from the Order, and then, having recovered it, to transfer it back to the Order again! For thus only could they comply with the express direction of the Act, to apply the recovered gift, 'according to the intention of the

[1] See p. 48, n. 3.

[2] See p. 13 (4).

donor.' The whole proceeding would thus become involved in a network of absurdities.

The cases, then, dealt with in the section are those in which a gift is 'misapplied,' not in the sense that it has been assigned by the donor to an illegal purpose, but in the sense that,—having *been assigned by the donor* to *a purpose not only lawful but charitable*,—it has been *wrongfully diverted from that purpose* by an executor or trustee, or by some person who, though neither executor nor trustee, has in some way managed to get control of it.

This, it is obvious, effectually meets O'Connell's allegation that the Bequests Act obliges the Commissioners to plunder the property of the prohibited Orders. Bequests to, or in favour of, any of these Orders are, no doubt, invalid under the penal sections of the Act of 1829. But it is no part of the duty of the Commissioners under the Bequests Act to put those sections of the Act of 1829 in force.[1]

The second part of this second Opinion had reference to bequests and other gifts made to, or in favour of, *individual members* of religious Orders. Such gifts were not void under the Act of 1829.[2] But were they, as O'Connell maintained, made void by the Proviso in the 15th section of the Act of 1844?

In the working out of O'Connell's policy in reference to the Act, the answer to the question thus raised was of cardinal importance. In his view of the matter, the Act of 1829, inasmuch as it affected only gifts to a religious community, left it open, as he expressed it, 'to vest *in a single friar*, property *for the use of the community*.'[3] That, he said, held good before the Bequests Act of 1844; but, he added, since that statute, 'not only no community of regulars, but *no single*

[1] See p. 48, n. 3. [2] See pp. 62, 63.

[3] Of course it did nothing of the kind, the community being, under the Act of 1829, an illegal body, any trust held for its benefit would be void. See pp. 63, 64.

regular can take or enjoy *any species of property*, either in land, houses, or money, *for the support of the Order or of any portion of the Order.*' [1]

This was because, in his view, the Act of 1844 declared void gifts made even to an individual member, or to individual members, of the Order in question.

But the 22nd section of the Act of 1844 may well be taken as decisive on the point. It enacts, without qualification, that—

> Nothing herein contained shall be taken to avoid [2] or render unlawful any donation, devise, or bequest, *which, but for this Act, would be lawful.*

O'Connell, as we have seen, interpreted this as meaning only that *no express enactment* of the Act is to be taken as having that effect.[3] But the section refers, not to 'express enactments' merely. What it says is that '*nothing*' contained in the Act shall be so taken,—thus excluding not only 'express enactments,' but everything else in the Act as well.

XIX.—*The Fourth and Fifth Public Meetings of Protest in Dublin.*

Until O'Connell, as was his custom, left Dublin a few days before Christmas to spend the Christmas holidays in his home in Kerry, the meetings of protest against the new Act continued to be held in the various districts of the city.

Thus, on the 8th of December, there was a meeting of the parishioners of St. Catherine's, and, on the 15th of that month, a meeting of the parishioners of St. James's.[4]

[1] But see p. 80, n. 2. [2] See p. 15, n. 1. [3] See p. 65.

[4] In the week following the 8th of December no meeting was held in Dublin.

O'Connell was then absent in Waterford, where he was entertained at a public banquet in celebration of his release from prison, and where he also presided at a public meeting of protest against the obnoxious Act.

At that meeting he arrived in company with the Bishop of Waterford, who took the second chair.

At these two meetings, however, O'Connell, though he was, as usual, the principal speaker, had little or nothing of interest to say that he had not said before.

XX.—*The Sixth Public Meeting of Protest in Dublin: presumption of an amateur legal critic chastised.*

In the week before Christmas, three meetings were held in Dublin on three consecutive days.

Of these, the first was a meeting of the parishioners of St. Audoen's, held on the 17th of December in the new Parish Church then in course of erection in that parish.[1]

This meeting was signalised by a vigorous chastisement of an amateur legal critic of one of O'Connell's favourite points in his denunciations of the Bequests Act. The victim of his indignation was a priest who had presumed in a letter to the press to criticise the legal argument by which O'Connell had on more than one occasion proved to his own satisfaction that it would be the duty of the Commissioners under the new Act to deprive the regular clergy of their property, as being, in point of law, 'misapplied.'[2]

Now, looking into the 12th section of the Act, which defines the duty or the powers of the Commissioners in reference to the recovery of 'misapplied' gifts, O'Connell's critic saw that the word in the Act is not 'shall,' or 'must,' but 'may.' From this he concluded that there was no obligation imposed on the Commissioners in this matter, and that, whilst they were empowered to 'plunder the friars' if they were inclined to do so, they were perfectly free to abstain from the plunder if they so wished.

From the line of argument on which O'Connell's

[1] For the report of this meeting see *The Freeman's Journal* of December 18th, 1844.

[2] See pp. 60-62.

critic thus staked his case, two things are manifest: first, that he was singularly ill-equipped for his self-imposed task; and secondly, that he must have been guilty of supreme rashness in committing himself to a statement,—and, to make the matter worse, an argumentative statement,—upon a point of law, in reliance upon his own unaided intelligence, neglecting the elementary precaution of submitting his amateur law to the expert judgment of some professional lawyer.

O'Connell, as was but natural to expect, took full advantage of the opportunity thus afforded him. In reply to his critic, he said:—

> The Catholic Commissioners will be bound to discharge this duty [of taking away the property of the Regulars].
>
> It has been rather sillily suggested that it is *not imperative* on the Catholic Commissioners to do this, inasmuch as *the word of the statute is* '*may*,' and *not* '*must*'; the 12th section declaring that the Commissioners *may* sue for the recovery of every charitable donation, bequest, or devise, etc.
>
> But there never was a more foolish mistake than to suppose that this relieves the Commissioners from a positive obligation.
>
> The word 'may' . . *gives the Commissioners power to sue.*
>
> The youngest lawyer in the Hall [of the Four Courts], if he knows anything at all of his profession, knows this, that all the Courts have again and again decided that the word *may* is to be read as *must* when it is found in any clause of an Act, which *gives a power* or *imposes a duty.*

It is not to be supposed that O'Connell, if accurately reported as to this part of his speech, meant to define with legal accuracy the cases in which 'may' is to be read as 'must' or 'shall.'[1] For the purposes of his

[1] The statement, not uncommonly made, that there are cases in which, in legal use, 'may' *means* 'shall' or 'must' is apt to create the idea that legal terminology is hopelessly unphilosophical.

The anomaly is but an apparent one.

What it comes to is this. There are cases in which the possession of a power brings with it a legal obligation to exercise that power. If, then, in such a case, a person 'may' do a thing,—that is, if he is legally empowered to do it,—the legal obligation to do it comes into play. And this is somewhat clumsily expressed by the statement that, in such a case, 'may' *means* 'must,' or 'shall.'

speech it was required only that he should make it plain to his popular audience that there are cases in which, in legal construction, the word 'may' *does not imply the absence of an obligation*, and that, consequently, the criticism to which he was replying was groundless.

Elementary as is the point thus brought out by O'Connell, his critic obviously had never heard of it, and O'Connell did not let pass the opportunity of administering a well-deserved rebuke:—

> If clerical gentlemen, instead of writing in the newspapers upon law-questions which they do not understand (how could they?), were to take the opinion of a lawyer of any standing, he would inform them, etc., etc., etc.

But, strange to say, it never seems to have occurred to O'Connell that the sound principle underlying this rebuke can be applied in more ways than one. It is, to say the least of it, not altogether unknown that at times even 'legal gentlemen' write argumentatively on points in the canon law of the Catholic Church—points which they plainly 'do not understand,' and, as we add with O'Connell, 'how could they?' We have indeed seen an instance of this in one of the professional Opinions given in reference to the Bequests Act by O'Connell himself.[1]

It will, of course, be understood that O'Connell's effective demolition of the argument that was put forward by his critic, based upon the use of the word 'may' in the 12th section of the Act, does not weaken in the slightest degree the explanation already given of the true meaning of that section.[2]

XXI.—*The Seventh Public Meeting of Protest in Dublin: O'Connell's speech; a marked falling off in buoyancy of spirit; two points of special interest.*

On the 18th of December, the day after the meeting of the Catholics of St. Audoen's parish, there was a

[1] See pp. 21 (3), 36-39.

[2] See pp. 79, 80.

meeting of 'the Catholics of the United Parishes of SS. Andrew, Mark, Peter and Anne.'[1] The meeting was held in the Carmelite Church, Clarendon-street.

O'Connell's speech at this meeting was but a short one, and the confidence of tone that was so striking a feature of his speeches at more than one of his former meetings was unmistakably absent. Everything would seem to indicate that he was depressed by the rumour then strongly current in Dublin, that, in spite of all his denunciatory warnings, Dr. Murray and some other Bishops had accepted places on the Bequests Board.

Except upon two points, O'Connell's speech contained but little that bore directly on the Bequests Act or its administration.

First, he gave an interesting account of an unsuccessful attempt at one time made by Sir Edward Sugden[2] to extend to Ireland the English Act of George II. known as the Georgian Mortmain Act.[3] O'Connell, in his speech, exulted in recounting how he had defeated the attempt, and had even succeeded in having the leave of the House for the introduction of Sir E. Sugden's Bill refused.[4] It was a fragment of that Bill, which, in 1844,—Sugden being then Lord Chancellor of Ireland,—was passed into law as the 16th section of the Irish Bequests Act of that year, and

[1] The district covered by those four Protestant parishes (see p. 46) corresponded roughly with the present Catholic parish of St. Andrew.

For the report of this meeting, see *The Freeman's Journal* of December 19th, 1844, or *The Pilot* of the following day.

[2] Sir Edward Burkenshaw Sugden, here referred to by O'Connell, was a member of Parliament at intervals from 1828 to 1834; Lord Chancellor of Ireland, 1834, 1835, and again, 1841-1846; and Lord Chancellor of England, as Lord St. Leonards, March-December, 1852.

[3] This Act (as to which see Appendix H.) made void all bequests of real property,—and, to a certain extent, bequests of personal property,—for charitable purposes. It moreover made void such gifts *inter vivos* for charitable purposes, unless made by deed executed at least twelve months before the death of the donor, and unless also certain other stringent conditions were complied with. See Appendix H., pp. 23*-27*.

[4] For a reference by Sir Edward Sugden to this incident, see Appendix J., p. 32*.

has been most iniquitously retained on the statute-book without modification to the present day.[1]

O'Connell, speaking of his successful opposition to the introduction of Sir E. Sugden's Bill, said :—

> I claim some of the confidence of my countrymen for the consistency with which I always opposed such a measure in the present Bill. . . .
>
> No person can say that this is a subject I took up for present purposes, or that I took up vexatiously (hear, hear).

But he could hardly have meant to suggest that any fair-minded person ever thought of criticising unfavourably, on the ground of inconsistency or on any ground, his opposition to the 16th section of the Bequests Act.

Another point to be noted here is that at this meeting, O'Connell, in the course of a contemptuous reference to the Attorney-General (T. B. C. Smith), professed in advance, and with emphasis, his readiness to reply to the Opinion, which, as was then commonly known, was about to be given by the Law Officers of the Crown in reference to the position of the regular clergy and their property as affected by the new Act.

On this point, he reminded his hearers that it was 'T. B. C.' who was officially responsible for the legal proceedings that had been set aside by the recent judgment of the House of Lords reversing the decision of the Irish Court of Queen's Bench in the case of O'Connell and his fellow-traversers.

He then asked,—

> Am I to be told that this man's Opinion is to be the ruling star and guide of any portion of the Catholic body ? (hear, hear).
>
> *If the Attorney-General's Opinion is to be published, I will reply to it.*
>
> I will not reply to any clergyman who writes on this Bill, but *I will reply to the Attorney-General,* for that is quite another thing.

In what follows there is reference to a Pastoral

[1] See Appendix H., pp. 27*, 28*.

Letter, which it was understood was about to be published by Dr. Murray :—

> Allusion has been made to a Pastoral Letter which is expected from the Archbishop.
>
> If that Pastoral appears, *I will bow before it with all dutiful submission*, and will reverence everything that comes to me under his authority.

But before we proceed much farther we shall see how little came of O'Connell's defiant challenge to the Attorney-General on the one hand, and of his 'dutiful submission' to the Archbishop on the other, when the time arrived for translating his undertakings into action.

XXII.—*Appointment of the Commissioners under the Requests Act officially announced.*

In the afternoon of the day of the meeting at St. Audoen's, the appointment of the ten appointed Commissioners[1] was officially announced in a special issue of *The Dublin Gazette*.[2] The five Catholics appointed were, three Bishops and two laymen.

The Bishops were the Primate (Dr. Crolly), the Archbishop of Dublin (Dr. Murray), and the Bishop of Down and Connor (Dr. Denvir).

The lay Catholic Commissioners were two Privy Councillors,—the Right Hon. Sir Patrick Bellew, Bart., and the Right Hon. A. R. Blake, Treasury Remembrancer for Ireland.

XXIII.—*The Eighth Public Meeting of Protest in Dublin; a hostile demonstration against the Bishops who had accepted Commissionerships.*

The eighth public meeting of protest in Dublin, closing the series of meetings in the districts within

[1] See p. 11 (1).

[2] See *The Freeman's Journal* and *The Pilot* of December 18th, 1844.

the city, was a meeting of the Catholics of the 'United Parishes of St. Mary, St. Thomas, and St. George.'[1] It was held on the 19th of December in the Church of the Dominican Fathers, then in Denmark-street.[2]

The acceptance of Commissionerships by the three Bishops was, of course, a heavy blow to O'Connell's prestige. His emphatic and repeated assurances, given expressly on legal grounds, that it would be the duty of the Commissioners to plunder the property of the religious Orders, had evidently been treated by three Bishops of prominent position in the Irish Church as of no account. And no one could suppose that in so grave a matter those Bishops had acted otherwise than on what they had good reason to regard as the best legal advice within their reach.

In his speech at this meeting, O'Connell stated that, when speaking at the meeting held the day before, he was unaware that the three Bishops, Dr. Crolly, Dr. Murray, and Dr. Denvir, had accepted Commissionerships.

At this point, the mention of the names of those prelates was received by the meeting with cries of 'oh' and hisses. And, totally unlike what could have been expected from O'Connell, he allowed this noisy ebullition of feeling to pass without a word of remonstrance or regret.

Afterwards, indeed, towards the close of his speech, he referred to the disrespectful demonstration, but in a somewhat curious fashion, not specially calculated to discourage a repetition of it. Developing a favourite point of his, that the Bequests Bill was introduced by

[1] The district covered by the three Protestant parishes (see p. 46) above named was, roughly speaking, that bounded on the south by the Liffey, on the west by Capel Street, on the north by the North Circular Road, and on the east by the sea.

It was practically coincident with the Archbishop's Pro-Cathedral parish, including, as that parish then included, the present parishes of St. Laurence O'Toole and St. Agatha.

[2] For the report of this meeting see *The Freeman's Journal* of December 19th, 1845, or *The Pilot* of the following day.

Sir Robert Peel and his Ministry with the express purpose of causing dissension in the Catholic body in Ireland, he spoke as follows :—

> This day I witnessed, not without deep regret, the *natural* ebullition of over-strained feeling on the part of some zealous and worthy Catholic citizens, who *perhaps* delivered their sentiments with an excess of zeal that *had better been avoided.*

His own extraordinary view of the consequences of the acceptance of the Commissionerships by the three Bishops, he stated very explicitly as follows :—

> *I solemnly declare my conscientious conviction* that a more unhappy event,—*an event more pregnant with danger to the purity of Catholicity in this country* (!), . . . more *injurious to the full flow of charitable benevolence*, . . . could not occur.

A considerable portion of O'Connell's speech on this occasion assumed,—in accordance with the extraordinary statement in his first Opinion,—that every charitable bequest and gift in Ireland was to pass through the hands of the Commissioners ![1] Thus he said :—

> Before this Bill was passed, the Catholics were in the habit of giving large sums in charitable donations and bequests . . . There may be a repression of charity caused by it. Will not any Catholic, I ask you, look about him two or three times before he gives a charitable bequest into the hands of persons the majority of whom he abominates ? *Men will not like to have their property ransacked by these Commissioners.*

It could hardly give cause for wonder if some timid testators, otherwise disposed to bequeath some share of their assets for charitable purposes, should be debarred by this wildly alarmist view of the Act from doing so, in order,—as they believed in their reliance on O'Connell's statement,—to safeguard their property against being 'ransacked by these Commissioners.'

[1] See pp. 18-20

That the danger thus contemplated was by no means an imaginary one was soon afterwards shown by some occurrences mentioned by Dr. Cantwell, Bishop of Meath, in a letter of January 31st, 1845,—one of the letters of a curiously interesting series that will be referred to later on.[1]

In this letter, Dr. Cantwell wrote as follows :—

> Only one month has elapsed since 'the Act for the more effectual application of charitable donations and bequests' has been brought into operation,—[the Act came into operation on the 1st of January, 1845,]—and what has been the result? . . . I confine myself to its direct and immediate influence on the cause of charity itself.
>
> Already, as the Liberator predicted, is *the heavenly fountain almost entirely dried up.*
>
> During this one month, *four deeds*, conveying property of very considerable amount to religious and charitable institutions within this diocese, have been *committed to the flames* (!), and I have been requested to implore Mr. O'Connell to publish a form of deed which would enable pious Catholics to carry into effect their benevolent intentions, *secure from the grasp or control of a Commission* in which they never can repose confidence.[2]

It may fairly be assumed that when four cases of this kind occurred within a month in one diocese, the cases must have been numerous in which gifts to charitable purposes were cancelled in Ireland, and such cases must have continued to be numerous, as long as donors remained under the influence of O'Connell's emphatic, though utterly groundless, assertions that the Act would bring all charitable gifts within the 'great grasp' of the Commissioners, to be 'ransacked' by them.

But, to return to O'Connell's speech of the 19th of December. He did not pass from this topic without giving his hearers at all events some ground for hope. He said :—

> If any man comes and consults me,—it will cost him

[1] See Appendix O.

[2] See *The Freeman's Journal*, February, 1845, *The Pilot* of the same day, or the *Catholic Directory* for 1846, p. 411.

nothing,—I never used to take fees on charitable business (hear, hear),—if any man consults me, *I may yet be able to tell him* how to evade the obnoxious Commissioners, *and to effectuate his charitable intentions without his bequest coming into their hands at all* (loud cheers).

He could, of course, quite as usefully have told his hearers that, if consulted, he might be able to show them how a charitable bequest could be effectuated without its coming into the hands of the Dublin Port and Docks Board, or of the President of the United States of America.

As to keeping a charitable bequest out of the hands of the Bequests Commissioners, it did not need a lawyer of O'Connell's experience to tell intending testators how that feat could be accomplished. 'The youngest lawyer in the Hall'—to use his own expression,[1]—could be relied upon to tell them that to keep a charitable gift out of the hands of the Commissioners, so long as it was not being dishonestly made away with, very little legal skill was needed. All, in fact, that the donor had to do was what has been done in hundreds, and probably thousands, of cases from that day to this, namely, to make his will in the ordinary way, appointing his own executors or trustees.

The fact that three Bishops had accepted the office of Commissioners would seem to have suggested to O'Connell that it was incumbent upon him to repeat with even additional emphasis his former statement that it would be the duty of the Commissioners to 'plunder the friars.' At all events he repeated the statement, with emphasis, as follows:—

> I assert *in defiance of T. B. C.*,[2] it is made a duty, *enforceable by indictment*, to look out for charities given in aid of a house like this [the House of the Dominican Fathers], and to apply them to other[3] charitable purposes.
>
> *I assert that over and over again . . . I want to provoke T. B. C. Smith* to the discussion,

[1] See p. 83.

[2] See p. 75, n. 1.

[3] As to this word 'other,' see pp. 55, 62, 78-80, 91.

Towards the close of his speech,—which covered the usual round of now well-worn topics,—O'Connell took, upon one point, a novel line. The Bequests Act, he proclaimed, was aimed in particular at the Jesuits!

Thus he said:—

> I cannot help thinking, and why should I avoid saying, that this attack is on the Jesuits (hear, hear).
>
> Oh, I venerate and esteem the Jesuits,—I know a greater blessing was never given to the Church of God than the Order of Jesuits. . . . The greatest benefactors to the Catholic religion have been the Jesuits, and, I repeat, *I have no hesitation in saying* that this Bill is *intended to get at their properties*, and *prevent them from educating the Irish people* (!).

XXIV.—*The Official Opinion of the Attorney-General and Solicitor-General on the effect of the Bequests Act on the property of the Regular Clergy.*

On the 20th of December, the day on which the report of the last of the series of meetings of protest in Dublin was published in the newspapers, there was published also the official Opinion of the Law Officers,—the Attorney-General, Right Hon. T. B. C. Smith, and the Solicitor-General, R. W. Greene, Q.C.,—on the two points raised by O'Connell in his recent Opinion on the Bequests Act.[1]

This Opinion of the Law Officers, dated December 13th, was, on both points, diametrically adverse to the view that had been put forward by O'Connell.

First, as to the alleged duty of the Commissioners to take away the property of the religious Orders by reason of the obligation imposed upon them to sue for the recovery of 'misapplied' gifts, —the Law Officers expressed themselves in the clearest possible terms: no such obligation was imposed by the Act.

[1] See pp. 61-65.

On the point in question, they stated the law as follows :—

1. There is no express provision in the Act of 1829 making devises, donations, or bequests to, or in trust for, religious Orders or Communities of men, of the Church of Rome, bound by monastic or religious vows, unlawful.

2. Such devises, donations, or bequests are, however, unlawful as being *against the policy of that Act.*[1]

3. No Court, therefore, will enforce a trust in favour of such an Order or Community.

4. In cases in which charitable donations, devises, or bequests are invalid only as being contrary to the policy of the law, they are applicable to legally charitable purposes, and can be applied,—but only by the Crown, under the Sign Manual,—to such legally charitable purposes as to the Crown may seem proper.[2]

In concluding their statement of the law on this point, the Law Officers pointed out that, under the former Charitable Bequests Act,—the Act of 1800,[3]—

in case it should be . . unlawful . . 'to apply a charitable donation, bequest, or devise, strictly according to the directions and intentions of the donor or donors,' *the Commissioners* under that Act *were authorised to apply the gift to such charitable and pious purposes* as *they should judge to be nearest and most conformable* to the directions and intentions of the donor or donors.

This provision, they significantly add, is '*omitted from the enactment of last session*,'—that is to say, from the Bequests Act of 1844.

So far for the first of the two points raised by O'Connell in his Opinion.

[1] This is so, inasmuch as it is the express purpose of that Act to suppress those Orders and Communities in the United Kingdom.

[2] The 4th paragraph in the text above is inserted for the sake of completeness in stating the law as laid down in the Opinion of the Law Officers. But I am informed that, in the view now taken of the law regarding such cases, it is no longer considered that the power described above is vested *even in the Crown*. The bequests are simply void. See p. 48, n. 3.

[3] See p. 5.

On the second point,[1] the official Opinion is equally explicit. It states the law as follows :—

1. The Act of 1829 does not, either expressly or by implication, render a devise, donation, or bequest to *an individual member*, or to *individual members*, of such Orders or Communities unlawful : a devise, donation, or bequest to a member of such an Order or Community *for his own use*, or *upon any trust not contrary to law*, would be valid.[2]

2. The Bequests Act of 1844 *has not in this respect made any change in the law*, and is not calculated to prejudice, or raise any doubt as to, the pre-existing rights of any individual member or members of such a religious Order or Community.

3. In reference to O'Connell's suggestion that the Proviso at the end of the 15th section contains 'an express legislative declaration' that a devise, donation, or bequest to an individual member of a religious Order is illegal, the Law Officers, after stating that they did not concur in that suggestion, go on to say :—

> The 15th section of the Act was intended to facilitate the endowment by private donors of the Roman Catholic *secular* clergy ; and we are of opinion that the proviso in that section was added *to prevent any question being raised* that it authorised a donation, devise, or bequest to the Commissioners and their successors *for the benefit of any but secular clergy* ;
>
> The Proviso does not in our opinion, *either expressly or by implication*, render illegal *any donation, devise, or bequest which but for the passing of the Act would have been lawful.*
>
> The 22nd section of the Act[3] renders this construction of the Proviso quite clear.
>
> The statute confers no benefit on the regular clergy, but *it creates no disability, either expressly or by implication.*

One would think that the editors of the newspapers that were favourable to O'Connell's views of the Act would find that the writing of a comment on this

[1] See pp. 62-65. [2] See pp. 63, 64 ; 80, n. 2. [3] See p. 15 (8).

Opinion, representing it as satisfactory from their point of view, would call for a more than common exercise of journalistic skill. But nothing could be more mistaken. In their estimation, nothing more was needed to get rid of all difficulty than a few strokes of the editorial pen.

The Freeman's Journal was magnificent in the audacity of its comment :—

> The law officers, as in duty bound, differ much from Mr. O'Connell in their interpretation of some of the clauses of the Bill, but, in the main, *their opinion confirms in all its essentials the Opinion given by the Liberator as to the* practical effect of the Charitable Bequests Act upon the regular clergy (! ! !).[1]

In *The Pilot* of the same day, the following editorial comments are printed by way of introduction to the text of the Opinion :—

> The following we give merely because it is a public document, it being *too contemptible to deserve a place from any merit of its own.*
>
> Referring for an Opinion on a measure to its concoctors, must needs remind one of the homely saying—about holding a court in 'a very hot place' with a certain gentleman for judge.[2]

The view, then, taken of the Opinion in *The Pilot* office was far from coinciding with that taken in the office of *The Freeman's Journal.* But both journals concurred in assuming an air of perfect satisfaction.

XXV.—*Christmas at hand; O'Connell's holiday in Kerry: a vicious anonymous letter.*

On the day on which the Opinion of the Law Officers was published, O'Connell left Dublin to spend the Christmas holidays in Kerry.

Christmas being near at hand there was for some

[1] *The Freeman's Journal*, 20th December, 1844.
[2] *The Pilot*, 20th December, 1844.

days a lull in the agitation, at least in its more aggressive forms. This, then, may be a suitable point to refer to a matter not yet mentioned, which, as it happened, displayed itself in a rudely offensive form on Christmas Eve.

This was the publication of anonymous letters attacking with great bitterness those Bishops who were sufficiently clear-sighted to see through the clouds of sophistry by which the view of so many Catholics in Ireland,—ecclesiastics as well as laymen,—was being obscured, and who were also sufficiently courageous to do what they felt to be their duty, regardless of insult and of all personal considerations.

As a specimen of the letters which, at that time, the editors of responsible Dublin newspapers thought it no discredit to publish, one will suffice. A few extracts will sufficiently indicate its character :—

> Will we, brother Catholics,—will we permit our Bishops,—not all our Bishops, but some six or seven of them,—to sacrifice one of the dearest and most sanctified principles of our religion, the choice of a religious state of life (!), so clearly recommended in holy Scripture, approved of and authorised by the Canon Law of the Catholic Church,—will the Catholics of Ireland permit Doctors Murray, Crolly, and the rest of the *Peel Bishops*[1] to become the public executioners of the anti-Catholic and hateful English Government, and fasten the noose, so insidiously framed, about the neck of the ever venerable and dearly beloved religious orders ?
>
> No, Doctors Murray, Crolly, and the rest of the *Peel Bishops*, we Irish Catholics will not permit you to lay a finger on our venerable and dearly beloved religious orders (!).

And then, after some further choice specimens of forcibly feeble language in a similar strain :—

> Remember that you have not been made Bishops to

[1] The reference is to Sir Robert Peel, the Prime Minister, whose docile followers, if not whose creatures, the anonymous writer wished to represent some of the Irish Bishops to be !

destroy or betray the Catholic religion (!), its doctrine or discipline, (!) but to cherish, preserve, or hand it down to our children's children, whole and entire, pure and untouched, as it has been given into your hands.

And if you will not so act, if you, *in your own fancied power* and *self-sufficient arrogance*,[1] will attempt to oppose, not only the great majority of your brother Bishops and clergy in the case of the infamous Charitable Bequests Bill, but also the universal indignant cry of the entire body of us Irish Catholics against this detested penal law, *if you should draw the sword against us* (!) *we then tell you, Doctors Murray, Crolly,* &c., &c., *that we also will unsheathe the sword and fling the scabbard to the winds* (!).

No flinching on our part.

I am, Sir, your obedient servant,

AN IRISH CATHOLIC.[2]

XXVI.—*The Christmas of* 1844 : *Pastoral Letter of the Archbishop of Dublin.*

At Christmas, Dr. Murray, rightly judging that the time had at length arrived when he could usefully break the silence which he had until then maintained with such exemplary patience, addressed his flock, clergy and laity, in an impressive Pastoral Letter.

In this letter he spoke with pain of the angry discussions to which the recent enactment had given rise.

The machinery for carrying the Act into operation had, he said, been formed; a share in the execution of it had been assigned to him; and, since much misapprehension regarding it appeared to prevail, it had become his duty to place the Act, by a plain statement of facts, in its true light before the clergy and people of his diocese.

He then continued :—

It is to me a source of inexpressible pain that the deep

[1] The italics are in the original newspaper print.
[2] See *The Freeman's Journal*, December 24th, 1844.

convictions of my mind compel me to adopt, on this subject, a course of proceeding at variance with that which some of my most respected and beloved brethren would commend.

But conscience is a stubborn monitor. It is unsafe to despise its admonitions. And it warns me with a voice which penetrates my inmost soul, that it would be in me a gross dereliction of pastoral duty to fling away, through any human respect, the opportunity which this Act, imperfect as it is, places within my reach, of guarding in safety the treasury of the poor, and of securing for the service of the Church whatever property benevolent individuals may choose to vest in the new Board, to be permanently dedicated to that purpose.

This is the duty, and the whole duty, which will devolve upon those whose office it will be to carry this Act into effect. It is a duty worthy of Religion and dear to God, a duty in the faithful discharge of which His minister should think it well worth his while to encounter any share of unjust obloquy which the mistaken zeal of his opponents might move them to cast upon him.

Few Catholics, perhaps, will believe that this Act is anything like a perfect measure. It has defects which I deplore; they are defects, however, which leave it still a measure of substantial value.

He then went on to point out how unwise it would be to leave in the hands of Commissioners,—five of whom should be Catholics,—appointed perhaps at random, the administration of this important Act which was then to come into operation within a very few days. And he asked,—

How could we ever afterwards complain, how could we render with confidence an account of our stewardship to God, if, through our fault, an unfortunate choice should be made, and those important interests be confided to unworthy or incompetent hands?

Blessed be God, we have not to answer for that crime. Appointments have been made which, as far as human vigilance can avail, will render those interests secure.

Next, he proceeded to put to himself, and to answer with all possible gentleness, the objection which, as we may remember, had been raised by O'Connell

in some of his speeches at the meetings held by him in Dublin[1] in protest against the Act:—

Were not our charities safe hitherto? And who called for any new Act on the subject?

In answer to these questions, said the Archbishop, permit me to place before you the following document.

The document thus introduced was the Memorial[2] adopted by the Catholic Archbishops and Bishops of Ireland at their Annual Meeting held in Marlborough-street, Dublin, on the 15th of February, 1840, and addressed to Viscount Morpeth, then Chief Secretary for Ireland.

In it they called attention to the state of the law under which charities were then administered in Ireland; they enumerated in detail the office-holders in whose hands the administration of charities was placed;[3] they remarked that the Judges, as was well known, never attended the Board, and so left the business to be 'managed exclusively by Dignitaries and Clergymen of the Protestant Church'—the presence of one such Archbishop or Bishop being necessary to form a quorum.

Then, having put on record the many objections to which, in point of constitution and procedure, the Board in charge of the administration of charities in Ireland was open, they went on to call attention in particular to the far-reaching, and, as Dr. Murray rightly described it, the 'dangerous,' power vested in that Board,—that is to say, the power of alienating, under certain circumstances, Catholic bequests from the known objects contemplated by the testator, and of applying them to purposes which, if living, he would abhor.[4] That provision, in the words of the Memorial of 1840, led many Catholics to think 'that their bequests for the purposes of education or

[1] See p. 54 (4).
[2] See p. 7.
[3] See, upon all this, pp. 3, 4.
[4] See pp. 5, 6.

other charitable uses might be transferred to institutions or purposes the very reverse of their benevolent intentions.'

The prayer of the Memorial, then, was as follows:—

That the Board of Irish Charities may be rendered more generally useful and popular by the introduction to it of Roman Catholic Commissioners, or by some other means which may have a tendency to place their charities upon the same footing as those of their Protestant fellow-countrymen.[1]

Having transcribed the Memorial at length, the Archbishop remarked that its prayer had not at the time been heard, adding that the Bequests Act, recently passed, 'appears to have been intended to grant all that was then sought.'[2]

After this reference to the reform that had been effected both by the setting up of the new Board, and by the abolition of the power of the former Board to divert the application of charities from purposes to which they might deem it 'inexpedient' to apply them, Dr. Murray explained the nature of the power that was conferred on the new Commissioners, enabling property to be held for certain Catholic purposes in perpetuity without the intervention of trustees.[3]

This point, as has been already mentioned, was made by the Archbishop the occasion of a graceful reference

[1] See p. 7.

[2] More than this might, indeed, have been claimed for the new Act. The singular moderation, not to say weakness, of the prayer of the Memorial of 1840, cannot escape notice. It presented two alternatives, and the second of these,—in which alone there was even a suggestion of the need of equal dealing as between Protestants and Catholics,—was that '*something*' should be done which might '*have a tendency* to place the charities of Catholics upon the same footing as those of Protestants'!

The time apparently had not yet come when Catholics, even Catholic Bishops, would venture to put forward a claim based upon the principle of equality of treatment as between Catholics and Protestants. As, indeed, the history of more than one movement for the removal of a grievance pressing upon the Catholics of Ireland goes to show that the time has not even yet come when such a claim would not be far more likely to be ignored or rejected than to be acceded to.

[3] See pp. 13 (5), 14.

to O'Connell,—a reference doubly graceful in all the circumstances of the case. He said:—

On the 11th of March of this year, the most distinguished Member of the Catholic Body introduced into Parliament a Bill which, had it passed into law, would have been effectual for that purpose.

It was a Bill to enable Roman Catholic Archbishops, Bishops, and Priests, to take grants or conveyances to them and their successors without the intervention of trustees.

This would have been a perfect measure. It would secure to the Roman Catholic Bishops and Parochial Clergy respectively the direct conveyance of whatever grants should be intended for the permanent benefit of themselves and their successors . . .

It is unfortunate that the Bill did not pass into law. Afflicting circumstances, however, which are but too well known,[1] prevented it from passing beyond its first stage; *and the Charitable Bequests Act became a very imperfect substitute for it.*

Then passing on to the point which O'Connell, by his persistent recurrence to it in his speeches at the meetings in Dublin, had made the central point at issue in the case, the Archbishop explained that,—notwithstanding all that had been said to the contrary,—there was nothing in the Act to subject the regular clergy to any new disability.

As he expressed it:—

The limitation as to time, making bequests of real property for charitable purposes void, if made within three months of the death of the testator, affects every Catholic and Protestant in the land as directly as it does the members of religious Orders. In every other respect they remain precisely as they were before.

They receive no new concession through the Act; nor are they subjected by it to any new disability.[2]

But he asked,—

Is it not true that the Commissioners . . . even Bishops,

[1] The Archbishop's reference is, of course, to O'Connell's imprisonment. See p. 51, n. 1.

[2] See pp. 94, 126.

if they should accept that office, would be bound, in virtue of that office, to carry into effect . . . a penal law against the religious Orders? No. Their office does not even invest them with any such odious power.

God forbid that any Bishop, or any one deserving the name of Catholic, would accept the degrading office of carrying into effect a penal law against those venerated labourers in the sacred ministry, who discharge with edification all the duties of virtuous citizens, and whose only crime in the eye of the law is that they bind themselves by vow to aspire to the practice of the most exalted virtue by the faithful observance of the evangelical counsels in addition to that of the ordinary precepts of the Divine Law.

Fifteen years ago, when those penal clauses, of which there is now question, were introduced into an Act which enslaved [the regular clergy] whilst it set others free, the secular clergy of Dublin, myself included, were not slow in petitioning with a view to avert that threatened injustice.

We did not succeed. But as long as those clauses shall continue to disgrace the Statute Book, far from attempting to enforce them, we shall be anxious on every suitable occasion to petition for their repeal. And since the attention of our rulers has been now called to the degrading position in which an unjust law has placed those meritorious men, it may not, perhaps, be too much to hope that the legislature may be induced to restore them by an act of wisdom as well as of justice, to the enjoyment of those civil rights, which they have done nothing to forfeit.

Then returning to the consideration of the obnoxious 16th section of the Act, which he had previously touched upon but incidentally, the Archbishop continued:—

Having had occasion to mention the limitation of time within which bequests of land for charitable purposes would be valid, I cannot avoid expressing my deep concern that such a general[1] limit has been established. . . I cannot but

[1] Here we see that Dr. Murray, whose practical sympathy with the poor in their privations was one of his chief characteristics, would not have felt as he did on the subject of 'the three months clause' if it had been confined, as it was in the original form of the Bill, to bequests for the service of the Church. For, as he said, 'I do not desire that our Church should be enriched by the possession of extensive lands.'

What he protested against was the enactment of the provision as a restriction upon *bequests for charitable purposes of every description.*

consider it as an undue interference with the dominion of God over His own gifts, an attempt to limit the operation of His command to 'give alms' (Luke xi. 41), and an unholy instrument for disturbing the peace of a penitent soul when about to render an account of its abused stewardship before the Throne of Justice.

The Archbishop did not omit to refer to the grave charge that had been made, that the discharge by a Bishop of his duty as a Commissioner under the Act would involve an uncanonical interference with the rights of other Bishops in reference to ecclesiastical matters subject exclusively to their diocesan jurisdiction.[1]

As to this, he said :—

In cases of doubt as to who is the authorised priest for whom a donation or legacy may be intended, the usages and discipline of our Church are, for the present, placed under the guardianship of your own Bishops, who *will be able*, with the blessing of God, *to have a rule established* whereby in all such cases, *the certificate of the Diocesan Bishop* shall be *taken as conclusive evidence.*[2]

Then followed an expression of hope, and, at the same time, of resignation to whatever might happen :—

Surprising as it must appear, denunciations of the most awful nature have been poured out unsparingly against those who, without any hope of earthly remuneration, . . . undertake the task of carrying into effect the beneficent objects which the [Act] contemplates. Let us hope that more attentive reflection on the nature of their office will gradually dissipate the prejudices which exist most undeservedly against it.

But should this not be the case; should those who, at the expense of time and labour, undertake this work of mercy, be made the objects of ungenerous vituperation, . . conscious that in this respect they have nothing in view but the interests of that holy religion, for the safety of which they would be ready to sacrifice their lives, they

[1] See pp. 21 (3); 36 (3)-39; 39, n. 1.

[2] As to the outcome of the Archbishop's expectations and efforts in this matter, see pp. 118-121.

will calmly look up to the Great Searcher of Hearts, who knows the purity of their intentions, and, confiding in His mereiful guidanee, they will pursue their onward course, cheered by the reflection that He who 'went about, doing good,'—He whose life was one continued series of the most exalted benevolenee,—did not eseape the breath of calumny. 'The servant is not greater than his master' (John xv. 20).

Bringing the letter to a close, the Archbishop wrote in a more hopeful tone, which the experience of over seventy years has amply justified:—

You will readily believe, Beloved Brethren, how afflieting it must be to me to observe that the various views whieh have been taken of this subjeet have caused dissensions to spring up in this hitherto united floek; and that the differenees of opinion, whieh are perfectly lawful on all free questions, have, on this oeeasion, been sometimes expressed in language whieh eharity eould not sanetion.

I know that in your differenees, you have had but one objeet in view, the interests of our Holy Religion; and that you differ only as to the means best suited for promoting them. When the plain faets whieh I have plaeed before you shall be calmly viewed in the presenee of God, I venture to hope that the dangers whieh some have dreaded from the reeent Aet will be found to be visionary; and that the temporary differences of opinion whieh it has produeed will gradually die away without leaving any mutual jealousies or embittered feelings after them, so that, 'loving one another with the eharity of brotherhood' (Rom. xii. 10), you may 'with one mind and with one mouth glorify God and the Father of our Lord Jesus Christ' (Rom. xv. 6).[1]

XXVII.—*A critical point in the agitation reached.*

It had now become manifest that a critical point in the agitation had been reached. O'Connell plainly could not afford to allow matters to remain in the position in which they stood. At one side he had to face the direct contradiction given to his exposition

[1] For the full text of the Pastoral Letter see *The Freeman's Journal* of December 26th, 1844, and *The Pilot* of the following day.

of one of the leading sections of the Act by the Law Officers of the Crown. At the other, he was confronted by the dignified rebuke of the Archbishop. Both as a lawyer and as a Catholic, he was called upon to justify, in whatever way he could, the line of attack by which he had sought to undermine the working of the new Act.

Outside a gradually narrowing circle of adherents, with whom the fact that they had in the past been followers of O'Connell seemed to outweigh every other consideration, not many of the public could long remain satisfied with his mere assertions. It might perhaps be true that, as O'Connell so persistently asserted, no Catholic, and, in particular, no Catholic Bishop, could, without disgracing himself, become a member of the new Board. But it was not enough that O'Connell should say that this was so. Having said it, and especially having said it so persistently and so defiantly, it was his duty to prove it. This was recognised even by many amongst the most devoted of his adherents. But they had, of course, no misgiving as to his coming triumph in the discharge of the duty that thus lay before him.

For a few days there was a lull. A rumour even began to spread that O'Connell, after examining the Opinion given by the Law Officers of the Crown, had come to see that they were right in their view, and that he had been mistaken. But, almost immediately, there was published a letter, written by him on the 27th of December, to his friend the editor of *The Pilot*, in which he referred in characteristic fashion both to the Opinion of the Law Officers and to the Archbishop's Pastoral Letter.

His letter of the 27th of December was as follows,—the italicised word in its first line showing that he fully recognised the extreme urgency of the case :—

DARRYNANE ABBEY,

Feast of St. John the Evangelist, 1844.

MY DEAR BARRETT,

Announee for your *next* publication a letter addressed to the Right Reverend the Bishop of Meath on the subject of the lately published Opinion of Messrs. Smith and Green [the Law Offieers].

They are strange and fantastie opinions! Yet what is still more strange, and probably more fantastie still, is that these worthy gentlemen should be presented by Government as *assistant-counsel to the Catholic Prelates of Ireland* (!).

But on the other hand, how exquisite are the tone and temper of the Pastoral of his Graee the Archbishop of Dublin, and how suited to the meekness and piety of the venerable writer—the Most Reverend Dr. Murray![1]

What a pity it is that there should be found any persons,—and, in partieular, any barristers,—*to deceive and delude*, in matters of law or of fact, *so estimable a character as his Grace*!

Faithfully yours,

DANIEL O'CONNELL.[2]

As to the singular observation at the close of the second paragraph of this letter, it surely must have been as obvious to O'Connell as it was to the Archbishop or to anyone else, that the Opinion of the Law Officers, rather than that of any other lawyers, was obtained by the Irish Government simply as a matter of course, and in pursuance of a fixed official usage.

Besides, the professional Opinion of their official advisers, thus officially obtained, was the only effective guarantee that could be given by the Government in such a case. In no other way could they sufficiently convey to the Catholic Commissioners that, in becoming members of the Board, they stood clear

[1] See pp. 49-51.

[2] See *The Pilot* of December 30th, 1844, and *The Freeman's Journal* of the following day.

of the reproachful charge brought against them by O'Connell. Plainly, no member of the new Board could be arraigned before the public as having by his acceptance of a Commissionership become involved in the crime of plundering the religious Orders, when the Law Officers of the Crown had officially declared,—in reply to a case officially stated to them on behalf of the Government,—that, as a matter of law, the duties of the Commissioners under the new Act were in no way concerned with the enforcement of the penal sections of the Act of 1829.[1]

With the publication of this brief letter, the spirits of the leaders of the opposition to the Act revived. The rumour by which they had been disheartened was now silenced by the assurance given to the public by O'Connell himself. In the '*next*' issue of *The Pilot*, —that is to say, within two days,[2]—the 'strange and fantastic opinions' by which the Law Officers had sought to 'deceive and delude' the estimable, but too credulous, Archbishop, who had unfortunately been brought into contact with 'cunninger' men,[3] were to be put to the test of legal analysis at the hands of O'Connell himself.

XXVIII.—*The situation at the close of* 1844 *briefly reviewed.*

At this point it may be well to look back a little and review the situation as it stood at the close of 1844 and at the opening of the new year, 1845.

The last of the parochial meetings of protest in Dublin had been held before Christmas. And those

[1] See, as to this, p. 48, n. 3.

[2] O'Connell's letter dated the 27th December was published in *The Pilot* of Monday, the 30th of that month. The next day of publication of the paper (see p. 8, n. 1) was Wednesday, the 1st of January, 1845.

[3] See p. 50.

meetings had no doubt done a work of solid importance for the opponents of the 'nefarious,' 'accursed,' Act.

Whilst the meetings in Dublin were in progress, and on to the end of 1844, similar meetings of protest,—as we learn from the 'Catholic Annals' of that year,[1]—were held also by the Catholic inhabitants of the following places:—Castlepollard, Clare, Clogher, Cork, Derry, Drogheda, Dungannon, Ferns, Galway, Kells, Limerick, Longford, Loughrea, Mullingar, Tuam, Tullamore, Waterford, and Wexford.

There was, in addition, a continuous flow of newspaper correspondence,—many of the letters, no doubt, anonymous, but many also bearing the names of responsible and respected writers, both laymen and ecclesiastics,—expressive of unbounded confidence in O'Connell and his leadership, and enthusiastic approval of the political skill which they evidently believed had been displayed by him in his campaign against the detested Act.

There was, however, a dark spot in the outlook. This was the definiteness with which the Law Officers had, in their Opinion, set aside the statement upon which O'Connell had practically staked the case of the opponents of the Act,—his statement, namely, that amongst the duties imposed upon the Commissioners, was that of plundering the property of the regular clergy.

As to the possible issue of this conflict of views between O'Connell and the Law Officers of the Crown upon a point of vital importance, the prospect was for a time decidedly encouraging to the opponents of the Act.

On the 15th of December, a day or two before the Opinion of the Law Officers was published, O'Connell had formally pledged himself to his supporters and to

[1] See *The Catholic Directory* for 1846.

the public that if the Opinion was published, he would reply to it :—

If the Attorney-General's Opinion is to be published, *I will reply to it.*

I will not reply to any clergyman who writes on this Bill, but *I will reply to the Attorney-General.*[1]

And on the following day, in his speech at the meeting held in the Dublin Church of the Dominican Fathers, he made it plain that his object in all this was to force the Attorney-General to publish the Opinion so that there would be an opportunity of replying to it. As he himself put it :—

I assert in defiance of T. B. C.[2] that it is made a duty [of the Commissioners], enforceable by indictment, to look out for charities in aid of a house like this [of the Dominican Fathers], and to apply them to other[3] charitable purposes.

I assert that over and over again. . . *I want to provoke T. B. C. Smith to this discussion.*

But then, the Opinion of the Law Officers having been published in the course of the day on which they were thus defiantly called upon to publish it, O'Connell,—strange as it must have seemed to those who put faith in his exposition of the Act,—showed no great readiness to engage in the discussion which he had been so ready to provoke.

However, in his letter of the 27th December, written little more than a week after he had so boldly challenged the Attorney-General, 'provoking' him to the discussion, O'Connell committed himself to a definite statement on the point. Within two days from the publication of that letter,—that is to say, on the 1st of January, 1845,[4]—his refutation of the 'strange and fantastic' opinions of the Law Officers of the Crown would, he said, be in the hands of his

[1] See p. 86.
[2] See p. 75, n. 1.
[3] O'Connell's repeated interpolation of the word 'other' should not be overlooked. See pp. 55, 62, 78-80, 91.
[4] See p. 107, n. 2.

friend the editor of *The Pilot*, for publication in the New Year's Day issue of that newspaper.[1]

In its issue of the morning of that day, *The Freeman's Journal*, echoing the general expression of satisfaction at O'Connell's confident announcement, presaging, as it did, the inevitable overthrow of the blundering legal sophistry of the Law Officers of the Crown, wrote jubilantly :—

> We are glad to find the Liberator is about to operate upon the Opinion of his learned friends T. B. C. and Co. [the Attorney-General and Solicitor-General]—more especially as it was industriously circulated . . . that the Opinion had quite opened his eyes to his errors, and converted him.[2]

XXIX.—*O'Connell's promised reply to the Opinion of the Law Officers: a disappointing postponement.*

The New Year's Day of 1845 was the day upon which, according to the promise publicly made by O'Connell, his reply to the Opinion of the Law Officers of the Crown was to be published in his newspaper organ, *The Pilot*.[3] That evening's issue of *The Pilot* appeared in due course. But instead of the promised refutation of the Opinion of the Law Officers, there was published merely the following editorial note :—

> 'Mr. O'Connell's Letter.
>
> 'The letter, from Mr. O'Connell, announced in our last,[4] had not arrived before we went to press.'

Whether any explanation of the delay had been received by the editor, was not stated.

The postponement of O'Connell's promised reply was, of course, sadly disappointing to those who had confidently expected that the opening of the new year would be signalised by a triumphant vindication of his

[1] See p. 107, n. 2.
[2] See *The Freeman's Journal*, January 1st, 1845.
[3] See p. 109.
[4] See p. 106.

exposition of the law. The disappointment was intensified when three further issues of *The Pilot*,—those of the 3rd, the 5th, and the 8th of the month,—brought neither O'Connell's promised reply to the Law Officers, nor a word of explanation of the non-appearance of the reply, nor even an editorial reference to its non-appearance.

But no disappointment, no matter how keenly felt, could lessen the determination and enthusiasm with which the agitation against the new Act was kept up throughout Ireland.

Of the meetings of protest held early in 1845, the meeting at Belfast may be specially mentioned.

It was held in the Theatre, which was crowded in every part, and the references in the speeches to Dr. Denvir, the Bishop of Down and Connor, were by no means either friendly or even respectful, but they were thrown completely in the shade by the attitude of the meeting towards the Primate, Dr. Crolly, who had been Dr. Denvir's predecessor in Belfast.

Dr. Denvir, according to one speaker, never would have disgraced himself by accepting office 'under the iniquitous Bequests Bill' but for the influence exercised upon him by '*the man who was now known as his Grace the Most Rev. Dr. Crolly.*' He, continued the speaker, 'got "Grace" prefixed to his name,' but the speaker 'did not think he was made anything better by it.' This, he said, being his conviction on the subject, '*he wished Dr. Crolly luck of the word 'Grace' prefixed to his name.*' The report continues :—

> Mr. ——— (the speaker) then took up the pastoral letter of Dr. Murray, and having handled it very severely, concluded by moving the resolution.

The meeting having been thus wound up to a proper pitch of enthusiasm, the Primate's name, when next mentioned, was received with 'groans and hisses.'[1]

[1] See *The Pilot* of January 8th, 1845.

About this time, in a letter from the Bishop of Meath (Dr. Cantwell) to Dr. MacHale, we find the following further evidence of the excited state of feeling throughout the country :—

Drs. Crolly and Denvir went into Dublin on Friday morning: yet no proceedings of the Commission have been gazetted. I should not wonder if there had been a break up: but I have not heard a whisper to that effect. We must not relax our efforts till it (the Act) is fully extinguished. . .

The prelates (Commissioners) *will soon be pronounced insane* (!), should they persist in their unprincipled, unwise, and insane career. *May God convert them!* . . . .

It is impossible to conceive the state of Dublin and Armagh.[1]

XXX.—*O'Connell's letter of the 6th of January; sensational statements; irrelevant criticism; a further postponement of his promised reply.*

In both *The Pilot* and *The Freeman's Journal* of the 10th,—instead of the 1st,—of January, O'Connell's promised letter, addressed to the Most Rev. Dr. Cantwell, Bishop of Meath, appeared.

The letter was dated the 6th of January, and it was at all events sufficiently long to give room for a most exhaustive treatment of the vitally important topic on which O'Connell had undertaken to write. It extended over five columns of the newspapers, and covered a wide range of topics. But it kept studiously clear of the one subject of engrossing interest, O'Connell's treatment of which, the public, in view of his promise of the 27th of December, had for days been awaiting with intense anxiety !

He was not, however, without an explanation of the omission. It was the necessary result of the burden that he had to bear in watching over the Irish

[1] *Life of the Most Rev. Dr. MacHale,* vol. i. p. 566.

Church and saving it from the blundering of the Bishops :—

> It was (he said) my intention to have confined this letter to an exposure of the truly shuffling Opinion *about*, rather than *upon*, the 'Bequests Act,' published with the names of Messrs. Smith and Greene. . . But *matter of infinitely greater importance presents itself.*
>
> The plan of the English government *to undermine the Catholic Church in Ireland*, is daily developed more and more.
>
> The *fatal facility* with which some of our exemplary prelates, with pious intentions and pure designs, *fall into one snare after another*, encourages the ancient enemies of our faith and fidelity to augment their exertions, and to mature their plans, until they render them, as they conceive and hope, irresistible.[1]

He then proceeded to gratify the awakened curiosity of his readers by a sensational announcement fully in keeping with the opening of his letter.

The English Government had, he said, for some time past, had two 'active agents at the Court of Rome,' the 'design and object' of their mission being 'to obtain for the British Minister control over the Catholic hierarchy of Ireland.' Specifically, he added, the modes of obtaining that control were two: 'the first, by *a State provision for the payment of the Irish Catholic clergy*;[2] the second, by *a Concordat with the Pope, giving a power*, either direct and affirmative, or indirect and by negation, *to the British Crown to nominate to the Catholic prelacy all over Ireland.*'[3]

One of the negotiators he named : an English Catholic, Mr. William Petre. Mr. Petre, he said, had already succeeded to a considerable extent : he had obtained from the Propaganda a letter to the Primate, Most Rev. Dr. Crolly, '*unfavourable to the Repeal agitation.*' 'The letter,' O'Connell went on to say, 'has been for some

[1] For the full text of this letter, see *The Freeman's Journal* and *The Pilot* of January 10th, 1845.

[2] See pp. 52 (3), 54.

[3] See p. 59.

time in the hands of his Grace,'—adding with his usual readiness to pronounce judgment on such matters,—'but *it is not a canonical document.*'

It would be hard to suggest anything better calculated than all this to draw off public attention from his failure to make good the specific promise he had publicly made ten days before. The story, however, was but an outcome of the irresponsible gossip of Rome, to which, as the source of another groundless statement in a matter of grave importance, reference has been made on a former page.[1]

O'Connell's two statements in reference to the letter received by the Primate from Rome were most definite: the letter was 'unfavourable to the Repeal agitation,' and it was 'not a canonical document.' But, as we shall see a little further on,—and as O'Connell himself was speedily forced to admit,—there was no truth whatever in either of these statements.[2]

In *The Life of the Archbishop of Tuam* we find the following passages quoted from two letters of Dr. Cullen, then Rector of the Irish College, Rome, to Dr. MacHale.

In one of these letters described as written 'at the end of 1844,' Dr. Cullen wrote:—

I suspect the English Government is plotting something against our Church, and expects to gain over Rome.

The English agent here [Mr. Petre] is very busy about Irish affairs; Austria is also doing something.[3]

In the other letter, dated the 28th of January, Dr. Cullen wrote to the Archbishop of Tuam:—

I write a line *to contradict in the most decided way* the report of a projected Concordat with England. *There is not a word of truth in the whole matter.*

Perhaps I contributed to circulate this rumour. *I was*

[1] See p. 29.

[2] See, as to the first of these statements, p. 134, and, as to the second, pp. 130, 131.

[3] *Life of the Most Rev. Dr. MacHale*, vol. i. p. 559.

deceived by a conversation a priest in Rome had with Mr. Petre, in which *that gentleman stated* he was engaged in important negotiations here, *or at least made the people understand as much* (!).

He is not at all received in Rome.[1]

This, then, was the origin of the sensational tale which, for a time at least, had the effect of drawing off the attention of the public from O'Connell's failure to fulfil his promise to make good his wild statements about the impending plunder of the property of the regular clergy, in which the Primate, the Archbishop of Dublin, and the Bishop of Down and Connor were to take part.

But there is another point to be noticed here. O'Connell's letter of the 6th of January was, as already stated, an exceptionally long one, occupying five and a half columns of the newspapers.

Of these, the references to the doings, or supposed doings, of the two English agents at Rome occupied considerably less than a column. There remained close upon five columns available for an exhaustive treatment of the matter with which O'Connell had publicly pledged himself to deal in that letter,—his vindication of the accuracy of his view of the Bequests Act as to the impending fate of the property of the regular clergy, and his refutation of the view that had been set forth in opposition to his by the Law Officers of the Crown.

But, available as those five columns were for the fullest possible treatment of this matter, and eagerly anxious as O'Connell's adherents, bishops, clergy, and laity, were to witness his triumph and the overthrow of his opponents, he himself, strange to say, took a different view of the situation. He chose rather to fill the available columns almost exclusively with an unnecessary and profitless repetition of a number of the points that he had already put forward in his speeches

[1] *Life of the Most Rev. Dr. MacHale*, vol. i. p. 559.

in Dublin during the preceding month of December! But with these we need not concern ourselves here. A further statement of them could be of no interest to anyone who has read with even moderate care the preceding pages of this pamphlet.

There were, however, in the letter a few points which had indeed no reference, direct or indirect, to the matter upon which O'Connell had pledged himself to write, but were of some interest from the fact of their being new. For, turning aside from the fulfilment of his promise that in this letter he would make an end of the 'strange and fantastic' views of the Law Officers of the Crown, he now took upon himself a totally new burden,—a criticism of the Pastoral Letter that had been issued at Christmas by Dr. Murray!

The 'tone and temper,' the 'language and manner,' of the Pastoral, he, of course, pronounced 'excellent.' It was written, he said, 'with that subdued sweetness of disposition for which the venerated character of his Grace is so much respected.'[1] But he added:—

> There is nothing to conceal the mistakes in point of law into which [the Archbishop] has been led, or the errors in point of fact into which, with the best intentions, he has unhappily fallen.
>
> There are clauses in the statute which his Grace would certainly condemn *if he understood their legal meaning and operation as I do*, and if he had not been *misled by the shuffling of the Crown lawyers.*
>
> I, of course, regret that his Grace should prefer their opinions to mine; but that preference I accept with all dutiful submission and humility, reserving to myself *my undoubted right of proving* to his Grace *that I am right* and *the Crown lawyers are wrong*,—a task, I believe, not difficult to perform (!).

But, easy or difficult as the performance of that task may have appeared to him, no one could fail to see that he was extremely reluctant to undertake it. In

[1] See pp. 49-51.

any case, indeed, it must have seemed to not a few of those who read his letter, that, since he was postponing his promised reply to the Opinion of the Law Officers, to which his letter was to have been devoted, this mere off-hand reference to the Opinion was strangely out of place.

To return, however, to his new undertaking,—his criticism of the Archbishop's Pastoral,—he seemed to regard this as a very simple matter. Had not the Archbishop himself given away the whole case? Had he not admitted, in that 'spirit of truth and sincerity which distinguish all the life of the venerated prelate,' that the Act was 'imperfect,' that it was 'nothing like a perfect measure,' that it had 'partial blemishes,' and 'defects' which he 'deplored'? Above all, had he not acknowledged that it was not merely an 'imperfect' or 'defective,' but a positively 'mischievous,' Act?

O'Connell, of course, did not deny that there might be some small element of good in the Act. But, he said:—

> We must take the Act as it is. *Imperfect, defective,* and *mischievous,* as it may be, we must take it as it is. . . .
> If the Catholic prelacy, clergy, and people of Ireland acquiesce in this statute, they must take it with all its imperfections and defects on its head.

Now nothing could be more directly at variance with fact than to represent either Dr. Murray, or any one of those,—bishops, priests, or laymen,—who concurred with him in his attitude in all this matter, as having 'acquiesced' in the new statute,—a statute in reference to which the Archbishop had used those depreciatory expressions upon which O'Connell was endeavouring to ground a charge of inconsistency. And surely O'Connell did not mean to suggest that the fact of a measure being merely 'imperfect' or 'defective' could be a reason why anyone should decline to take a part in the administration of it.

But then, had not the Archbishop in his Pastoral

Letter used another, and a more serious, epithet, 'mischievous'? And how could he without inconsistency take part in the administration of an Act which he had himself stigmatised in his Pastoral Letter as 'mischievous'?

Of course if the Archbishop were to do anything of the kind, it would be a grievous departure from the line of common sense as well as from the line of duty. But then, Dr. Murray had not done anything of the kind. He had never stigmatised the Act as mischievous. One of its sections,—the 16th,—he had stigmatised, and rightly stigmatised, as mischievous. But that, plainly, is a very different thing from stigmatising as mischievous the Act itself,—all the more so, as in the administration of the section which he had so stigmatised, neither the Archbishop nor any other Commissioner under the Act, Catholic or Protestant, would have any part whatever.[1]

Only one other point in O'Connell's reckless criticism of Dr. Murray's Pastoral Letter seems to call for mention here. It has reference to the working of the 6th section of the Act.[2]

It will be remembered that, in his Pastoral Letter, the Archbishop had expressed his hope that the Bishops who had become members of the new Board would be able to have a rule established, by which, in all cases of doubt 'as to who is the authorised priest for whom a donation or legacy is intended, *the certificate of the Diocesan Bishop* would be taken as conclusive evidence.'[3]

[1] See p. 48, n. 3. [2] See pp. 11 (3)-13.

[3] In Dr. Murray's reference to the rule which he trusted would be adopted by the Commissioners in regard to this matter, he of course spoke of the rule as it would affect the interests of Catholics.

But, equally of course, such a rule, if adopted at all, should be so framed as to apply to bequests or other gifts to a minister or other religious functionary of any body of Protestants, Episcopalian or non-Episcopalian,—so that the same recognition should thus be given by the Commissioners to the certificate of the Moderator or other recognised authority in any of the religious bodies embraced within the term of 'Nonconformists,' as to the certificate of the Catholic or of the Protestant bishop, as the case might be.

It was perhaps but natural that O'Connell, viewing the Act as he did, did not regard with a very favourable eye Dr. Murray's effort to facilitate the working of one of its sections. But the line taken by him upon this particular matter in his letter of the 6th of January must be characterised as lying outside the bounds of even the loosest conception of fair criticism.

He began by a strange misrepresentation of what the Archbishop had written. For he represented Dr. Murray as having put forward his suggestion as a means of meeting a difficulty, *admitted by his Grace*, that the Commissioners are invested by the 6th section of the Bequests Act with a jurisdiction empowering them to interfere in a manner contrary to the canons, in matters subject to the diocesan jurisdiction of the bishops of the various dioceses throughout Ireland ! [1]

The perversion of fact in all this is so startling that it may not be superfluous to quote O'Connell's words :—

> Mark well that his Grace distinctly *admits the existence of the difficulty* (!).
>
> *He admits* that, according to the statute, *one Catholic bishop*, being on the Commission, *gets jurisdiction over the diocese of another bishop* (!). Nay, the Catholic laymen in the Commission obtain from the statute similar jurisdiction.

And on the foundation of this bold misstatement of fact, O'Connell's criticism of Dr. Murray's suggestion continues as follows :—

> The existence of *an uncanonical authority*, in and by the Act, *being avowed* (!), his Grace suggests a remedy,—'the making of a rule whereby the certificate of a Diocesan as to who is the authorised priest shall be taken as conclusive evidence.'
>
> Such is the remedy suggested by his Grace. As a lawyer, I am bound to inform him that such a remedy is IMPOSSIBLE. [2]

[1] See pp. 21 (3), and 36 (3)-39.

[2] This word is printed in capitals in O'Connell's letter.

And O'Connell then proceeded to give what he regarded as conclusive proofs of the impossibility of such a rule being made by the Commissioners. It would, however, be a mere waste of time to enter upon any detailed consideration of his legal reasoning on this point. It is all disposed of by the old scholastic maxim : *Contra factum non licet argumentari.* There was found to be no difficulty whatever in having the rule, as suggested by the Archbishop in his Pastoral Letter, adopted by the Commissioners.

Of course the rule is but a rule of procedure. It has not, nor was it meant to have, the authority of an Act of Parliament.[1] But it has not been the less useful on that account.

The instances in which it has been found necessary to appoint a Committee under the 6th section have indeed been exceedingly rare. It is believed that since the Act came into operation in 1845, there have been but two such instances. But the procedure embodied in the rule adopted by the Commissioners for cases such as are contemplated in that section has found a much wider application. The cases are exceedingly numerous in which there is vested in the Commissioners a capital sum, the interest on which is payable by them, either once for all, or at stated times,—such, for instance, as every six months or once a year,—to the holder of a specified ecclesiastical office. In such cases, the person to whom the payment

[1] From the legal reasoning on which O'Connell relied in proof of his assertion that the making of the rule suggested by the Archbishop was impossible, it is plain that he altogether misconceived the meaning of the Archbishop's suggestion. He must have been under the impression that what the Archbishop had in view was the adoption of a rule which a Committee appointed under the 6th section would, whether the Committee might like it or not, be legally bound to follow.

The making of a rule legally binding would of course be outside the powers of the Commissioners. But there was nothing to hinder the Commissioners from agreeing amongst themselves to adopt the rule as a rule of procedure if they thought fit to do so, as in fact they did.

is to be made is invariably ascertained in the manner indicated in the rule.

This letter of the 6th of January did not close without a renewal by O'Connell of the promise previously given by him on the 27th of December,[1] that his refutation of the 'strange and fantastic' opinions of the Law Officers would be published without delay, in the form of a letter to the Bishop of Meath.

Referring to his statement, so often repeated, that the Bequests Act made it 'the duty of the Catholic Commissioners' to take away the property of the regular clergy, and apply it to other[2] purposes, he said in this letter of the 6th of January :—

> This letter has run to such a great length[3] that *I must reserve this subject as the exclusive topic for a second letter*, to follow this *without any delay whatsoever.*
>
> I trust *by the next post after this letter arrives in Dublin*, it will be followed by the letter on the regular clergy.

XXXI.—*The First Meeting of the Bequests Commissioners.*

On the 9th of January, 1845, the Commissioners appointed to administer the Bequests Act of the preceding year held their first meeting.[4]

Practically the first official act of the Commissioners at that meeting was the adoption,—most probably as the result of previous informal consultation,—of a rule or bye-law on the line indicated by Dr. Murray in his Pastoral Letter.[5]

[1] See p. 106.

[2] O'Connell's persistence in inserting the word 'other' in his statements of the law regarding the impending spoliation of the property of the regular clergy has already been noticed. See pp. 55, 62, 69, 78-80, 91.

[3] But, as to this, see pp. 115, 116.

[4] The Commissioners met, not in Dublin Castle,—as O'Connell had somehow come to assume would be the case (see p. 49, n. 3),—but in their Offices, 25 Lower Gardiner-street, where they continued to hold their meetings until 1867, when they removed to their present premises in Kildare-place.

[5] See p. 103.

The bye-law is printed in the Appendix to the First Annual Report of the Commissioners. And in that Report the Commissioners expressed their satisfaction that, so far,—that is, down to the end of 1845,—no occasion had arisen in which it was necessary to act upon it, or to act in any way upon the provisions of the 6th section of the Act.

They also reported that, notwithstanding 'the vast variety of business' that had been transacted at their meetings,—thirty-one of which had been held during the year,—'and the many topics of importance which had necessarily called for discussion and decision,' 'not a single instance' had occurred 'in which there was ultimately a difference of opinion.'

XXXII.—*Another letter from O'Connell: his reply to the Opinion of the Law Officers again postponed!*

It would seem that as yet no suspicion was aroused in the minds of O'Connell's adherents as to any possibility of his being unable to make good the position which he had so ostentatiously, and indeed so defiantly, taken up, and had so confidently asserted his readiness to maintain.

In any case, it needed but little further exercise of patience to await the fulfilment of the renewed promise given in his letter of the 6th of January.[1] And they awaited the fulfilment of it, feeling assured that there would be no further postponements, and that the refutation of the Law Officers and vindication of O'Connell's legal Opinion would come to hand, as now promised, 'without any delay whatsoever,' possibly 'by the next post.'

A few days, however, passed, bringing from

[1] See p. 121.

O'Connell, not his promised letter, but a further postponement!

Writing to his friend Richard Barrett of *The Pilot*, on the 10th of January,[1] four days after his long letter of the 6th, he said:—

> I mean *to postpone for a few days* my second letter on the Bequests Act. I am tremulously alive to the apprehension that any one should conceive that my first letter was in any degree disrespectful to any of the Prelates who have accepted the Commission.
>
> I wish to postpone the second, that I may be able to apologize for, and indeed repudiate, any such meaning.

But inasmuch as no further apology or repudiation could be needed than that contained in this letter, the continued non-appearance of the promised refutation of the Opinion of the Law Officers was, to say the least of it, beginning to look somewhat suspicious.

In this letter of the 10th of January, O'Connell assigned another reason for this further postponement of his promised reply.

This was, that 'the letter which his Grace, the Catholic Archbishop of Armagh, *certainly* received from the Propaganda *on the subject of the Repeal agitation*[2] should, he said, *appear before he published another letter* (!).

Now, for more reasons than one, this was simply trifling with the grave matter that was in hand.

In the first place, there was no reason to suppose that the letter which the Primate had received would be published by him at all. It had reference exclusively to a matter of ecclesiastical discipline.[3] It was of course to be brought to the knowledge of the clergy. But that by no means involved its 'appearance,' in the sense in which O'Connell evidently understood the word in his letter of the 10th of January. And if the Primate in the exercise of his discretion, or if the Bishops in the exercise of their

[1] *The Pilot*, January 13th, 1845. [2] See pp. 113, 114.
[3] See p. 30, n. 4.

discretion, deemed it advisable to communicate the contents of the letter to the clergy in some way other than by publishing it, did O'Connell mean that his long-expected refutation of the Opinion of the Law Officers, and vindication of his own Opinion, would be given to the public ?

Besides, published or not published as the Roman letter,—which O'Connell described as 'unfavourable to the Repeal agitation,'—might be, it was not what his adherents were then anxiously expecting. What they were expecting was his defence of the view to which he had committed himself as to an alleged duty of the Primate, the Archbishop of Dublin, and the Bishop of Down and Connor, as Commissioners under the Bequests Act, to take part in plundering the property of the regular clergy.

Anticipating the possibility of there being some delay in the appearance of his promised letter, as the result of a possible delay in the fulfilment of his new requirement,—the publication of the Propaganda letter by the Primate,[1]—O'Connell provided his followers with a means of filling up the interval.

'The interval,' he said, 'between this and my second letter,'—that is, the letter which he had already on two occasions promised to write in refutation of the Opinion of the Law Officers,—'will be well filled by the admirable pamphlet of Mr. Serjeant Shee.'

XXXIII.—*The 'admirable pamphlet' of Mr. Serjeant Shee.*

Serjeant Shee was an eminent Catholic member of the English Bar,[2] who had just then published a pamphlet on the Irish Charitable Bequests Act.

Sharing what may be termed O'Connell's political views about the Act, he was strongly of opinion that

[1] See p. 123. [2] On the Serjeants-at-Law, see Appendix P.

neither Dr. Murray nor any other Catholic bishop should make himself in any degree responsible for the working of it. But the evil forebodings on which the part of the pamphlet devoted to this subject is based, are, in the main, of a prophetic character, and have been so completely falsified in the event that they do not call for mention here.[1]

The legal, or semi-legal, part of the pamphlet is in the form of a running commentary on the Bequests' Act, section by section.

As to this, only two points need be noticed :—

1. O'Connell's peculiar interpretation of the word 'misapplied' in the 12th section of the Act,—making that section applicable to *illegal gifts*,—is, as we have seen, the essential basis of his theory that the Commissioners would be bound to take away, and apply to other uses, the property of the regular clergy.[2]

Now there must surely have been amongst his adherents in the controversy that he had provoked, some intelligent persons who had been struck by the incongruity of his interpretation of the word 'misapplied' in that section of the Act.[3] It is indeed difficult to conceive how any unprejudiced and fairly intelligent person could fail to see the incorrectness of an interpretation according to which the section imposed upon the Commissioners two plainly inconsistent duties.[4] Yet it was upon that interpretation that O'Connell's case about the impending plunder of the regular clergy rested.

As O'Connell had stated that the interval before the appearance of his promised letter on the plunder of the regular clergy would be 'well filled' by 'the admirable pamphlet' of Serjeant Shee, it might not unnaturally be inferred that in that pamphlet would be found something that would help to clear away

[1] See pp. 10, 11.
[2] See pp. 55 (7), 60.
[3] See pp. 79, 80.
[4] See ibid.

such an obviously serious difficulty as that which would result from O'Connell's interpretation of the word 'misapplied.' But if anyone turned to the pamphlet expecting to find light thrown upon this aspect of the case, he was doomed to disappointment. For Sergeant Shee simply transcribes the section, leaving it to speak for itself.

2. The other main point upon which O'Connell relied in support of his contention that the Act of 1844 deprived the regular clergy of all protection against the plunder of their property, was that under this Act the prohibition of gifts to the regulars affected not only gifts to the Orders themselves or to 'parts' of those Orders, but also gifts to individual members of the Orders.[1] This, of course, if the case were so, would mean the imposition of a most serious additional penalty on the regular clergy.[2] It now only remains to quote from Sergeant Shee's pamphlet the following definite statement :—

> *I agree* (if I may be allowed to say so) with the Irish Law Officers of the Crown, that *this new Act adds nothing to the penalties already imposed upon them.*[3]

This, then, was the legal view propounded in the 'admirable' pamphlet strangely recommended by O'Connell to his adherents as helping them to fill up the interval before the appearance of his letter, —that letter in which he was to prove that the Opinion of the Law Officers on this very point was fantastically wrong!

There was, however, no reason to provide for the occurrence of an interval of any notable length. For, as it happened, the Propaganda letter[4] had been published by the Primate the day before O'Connell's letter of the 10th of January appeared in the newspapers.

[1] See p. 64. [2] See pp. 62, 63.
[3] See, on p. 94, the Official Opinion of the Law Officers.
[4] See p. 30, n. 4.

O'Connell, who was still in his home in Kerry, was not aware of this. But as his friend, the editor of *The Pilot*, commenting on the Propaganda letter in his issue of the 13th of January, remarked, the Roman letter having been published, there was no longer any reason for the postponement of O'Connell's letter making good his legal view about the impending plunder of the regular clergy, so that his letter might now be expected with the least possible delay.

That in this expectation the editor of *The Pilot* was unduly hopeful, was made strikingly manifest before very long.

XXXIV.—*Reply of Pope Gregory XVI and of the S. Congregation of Propaganda to the suggestion of the Archbishop of Tuam.*

It will be remembered that, not many days after the meeting of the Irish Bishops in November, 1844, the Archbishop of Tuam addressed two letters,—one to Cardinal Fransoni, the Cardinal-Prefect of Propaganda, the other to his Holiness Pope Gregory XVI,—suggesting that a mandate should be sent from the Holy See forbidding any Irish Bishop to accept the position of Commissioner under the new Bequests Act [1] without the sanction of the Holy See and the assent also of his colleagues in the episcopate of Ireland.

His Grace had requested that the mandate should be sent from Rome so as to reach Ireland before the 1st of January, 1845, the day on which the new Act was to come into force.[2]

But the matter was not one that could be dealt with by the Holy See in the summary fashion contemplated by the Archbishop. And so Cardinal Fransoni's letter in reply was not written until the 30th of December, 1844, and did not reach Ireland until about the middle

[1] See p. 43. [2] See ibid.

of the following month, a fortnight or so after the Bequests Act had come into operation.[1]

The Cardinal-Prefect began by stating that the shortness of the interval between the arrival of the Archbishop's letter in Rome and the time at which a reply could be sent so as to reach Ireland before the 1st of January had made it impossible to comply with his Grace's request that he should receive the reply before that date. But the reply contained no further reference to that request.

His Eminence went on to express surprise that, as appeared from Irish Catholic newspapers, the Archbishop, without waiting for a reply from the Holy See, had, in a Pastoral Letter and in other writings, written with harshness against those Bishops whose views differed from his and from the views of those Bishops who were in agreement with him.

The Bishops against whom his Grace had thus written were acting, the Cardinal observed, in accordance with the resolution adopted by the Bishops at their general meeting ;[2] they were obeying the voice of conscience, and looking only to what might be considered best in the interests of the Church in Ireland.

Furthermore, his Eminence,—writing, as he said, in discharge of a twofold duty, as he was replying to his Grace's letter in the name of his Holiness, as well as in that of the Sacred Congregation,—appealed to the Archbishop to consider the many evils that could not fail to result from dissensions amongst the Bishops. And the letter, which was a fairly long one, closed with an impressive exhortation on that subject.

Thus the result of the Archbishop's request to the

[1] The reply to Dr. MacHale's letter to Cardinal Fransoni is not mentioned by his Grace's biographer. But the time at which the Cardinal's reply arrived can be fixed with sufficient accuracy by what is known of the interval which, at the time in question, usually intervened between the sending of a letter from Rome and its delivery in Ireland.

[2] See p. 33.

Holy See was not at all what the information he had previously received from Rome[1] could have led him to expect. But, sometime before the receipt of Cardinal Fransoni's letter, and indeed before that letter can have been written,—probably even before his Grace's letter conveying his request had reached Rome,—there had been indications that the Holy See was not at all likely to express disapproval either of the Bequests Act, or of those Bishops who considered that they were but discharging a duty in not yielding to the outcry that had been raised against it.

Dr. Cullen, in particular, had found it advisable to put some of his Irish correspondents on their guard against being over confident that the Holy See was unfavourably disposed towards the new Act. This step he no doubt felt it specially incumbent upon him to take, as he had himself contributed to the growth of the feeling, then very general in Ireland, that a condemnation of the Government measure by the Holy See might be looked for with confidence.[2]

Writing, then, to the Archbishop of Tuam on the 7th of December, he said :—

> Probably it will be more prudent not to write in public against the (Bequests Act), until the judgment of Rome is heard, or at most to do nothing but petition Parliament.[3]

And in another letter, written to the Bishop of Meath on the 8th of February, he said :—

> I cannot do much in the matter. . . *I was wrong in taking any part in the proceedings publicly.*[4] You will understand my position. *I do not know what they will do here.*
>
> God grant that nothing bad may occur in Ireland. Things are gone to a terrible state. Every exertion should be made to preserve or restore union. For God's sake, exert yourself.

[1] See pp. 25-29. [2] See pp. 25, 26.
[3] *Life of the Most Rev. Dr. MacHale*, vol. i. p. 575.
[4] See p. 29, n. 1.

And in the same letter, evidently having in mind his previous letter of the 3rd of the preceding October,[1] and, still more, Dr. Kirby's letter of the 29th of September,[2] he said :—

It is bad to push things to extremes. *I fear it is not wise to introduce censures in such cases.*[3]

XXXV.—*The Primate and O'Connell : a mistake becomingly acknowledged.*

Of the two explicit statements made by O'Connell in his letter of the 6th of January, in reference to the letter which the Primate had received from Rome,[4] the second,—that the Roman letter was '*not a canonical document,*'—was the first that he found himself obliged to withdraw.

Against that statement the Primate felt called upon to make a public protest. In a letter of the 11th of January,[5] he affirmed that the document in question was a strictly canonical one, received by him from the Holy See with a commission to place it before the Bishops assembled in general meeting,—a commission which he had executed by placing the letter before them at their meeting in the previous November.[6]

Then he went on to say that, knowing 'the honesty of O'Connell's heart,' and 'the fidelity with which he adhered to the teaching of the Church,' it seemed a matter of duty to subjoin the full text of the Roman letter, together with the Resolution in reference to it unanimously adopted by the Bishops at their meeting. This was a Resolution assuring the Holy Father that

[1] See pp. 27, 28. [2] See pp. 26, 27.
[3] As to this reference to censures, see pp. 27, 28.
[4] See pp. 113, 114.
[5] See *The Freeman's Journal* and *The Pilot* of January 13th, 1845, and *The Catholic Directory* for 1846, pp. 196-200.
[6] The document in question was that already referred to in connection with the Bishops' meeting in November, 1844. See p. 30 ; 30, n. 4.

the letter had been received by them with that 'profound respect, obedience, and veneration, that should ever be paid to any document emanating from the Apostolic See.'

The Propaganda letter, with the Bishops' dutiful Resolution in reference to it, were thus published by the Primate, in order, as he said, that O'Connell might not any longer be 'misled by unsatisfactory information' about them,—the genuine documents themselves being now placed before his 'impartial and powerful understanding.'

To the letter of the Primate, O'Connell replied, also in a public letter, offering, in characteristic fashion, his 'humble, but most hearty, thanks' for the 'very kind and flattering manner,' in which, 'after rebuking the mistake' he had 'fallen into,' his Grace had condescended to speak of him in his letter.

Thus he wrote :—

I retract at once, and unequivocally, any assertion of mine that may apply, or *seem to apply*, to the document published by your Grace, as being uncanonical.

I freely avow that the document . . is *perfectly* canonical, and even if my private opinion had been otherwise, I would at once yield it (!) to the authority with which that document is now clothed.[1]

So much, then, for O'Connell's categorical statement that the letter from the Holy See to the Irish Bishops was '*not a canonical document.*'

XXXVI.—*Progress of the agitation : letter of the Bishop of Meath ; action of the Dublin clergy.*

Meanwhile the agitation against the Bequests Act was vigorously kept up in Dublin and throughout the country.

On the 15th of January there appeared in the

[1] See *The Freeman's Journal* or *The Pilot* of January 17th, 1845, and *The Catholic Directory* for 1846, pp. 420-422.

newspapers a letter,—not, however, as might have been expected, from O'Connell to Dr. Cantwell, Bishop of Meath,[1] but from the Bishop of Meath to O'Connell.

In this letter, there was, naturally enough, no reference to O'Connell's non-fulfilment of his undertaking to make good his repeated statements that it was the imperative legal duty of the Catholic Commissioners to join in the spoliation of the property of the regular clergy. It was a letter thanking O'Connell effusively for the manner in which, in his letter of the 6th of that month,[2] he had, as the Bishop considered, shown up 'the anti-Catholic provisions of the insidious Bequests Act.'

The letter also gave expression to Dr. Cantwell's 'strongest hope,' that O'Connell's 'powerful and unanswerable' letter would 'determine those venerated prelates who, from the purest motives, had accepted the commission, promptly to resign an office which connects them with the enemies of our faith in carrying into effect *a law obviously levelled at the independence of that Church which triumphed over persecutions the most atrocious*, and of which those very prelates have been the steady pillars and brightest ornaments.'[3]

As showing to how small an extent Catholic public opinion was unfavourably impressed by O'Connell's continued postponement of his promised vindication of his own legal Opinion and refutation of that of the Law Officers, it may be mentioned that, at this very time, a petition to Parliament praying for '*the total and unqualified repeal of the Charitable Bequests Act*' was being signed by numbers of the clergy, secular and regular, of Dublin.[4]

[1] See p. 106. [2] See pp. 112-121.
[3] See *The Freeman's Journal* of January 15th, 1845.
[4] See *The Catholic Directory* for 1846, pp. 418–420, and *The Freeman's Journal* of January 18th, 1845, and following days.

Amongst the grounds assigned in support of the prayer of this petition were the following :—

That, by the Bequests Act, the disabilities of the regular clergy were 'confirmed *and aggravated,*' and that the Act imposed grievous hardships not only on the regular clergy, but also on the secular clergy and laity of their communion, 'by *subjecting the Bequests of Roman Catholics to the control* (!) *of Commissioners,* nominated by and removable at the pleasure of the Crown,' 'by *encroaching on the canonical jurisdiction* (!) of Roman Catholic Bishops, and so forth.'

The petition, then, prayed (1) for the repeal of those penal sections of the 'Emancipation' Act, that affected the regular clergy, and (2) for 'the total and unqualified repeal of the Charitable Bequests Act,' and the substitution in its stead of the Bill introduced by O'Connell in the session of the preceding year.[1]

It is of no little interest to note that amongst those who signed this petition were the two then curates of the parish of Clontarf,—Edward M'Cabe, and Edward Kennedy,—afterwards the Cardinal-Archbishop of Dublin, and his Eminence's trusted and esteemed Vicar-General.

At the same time, a petition to Parliament, praying for the repeal of those sections of the Act of 1829 that penalised the regular clergy, was being signed in Dublin by the Archbishop and by those members of the clergy who, like the Archbishop, did not see their way to ask for the 'total and unqualified repeal of the Charitable Bequests Act,' feeling convinced, no doubt, that more harm than good would result from its repeal.

[1] See p. 17.

XXXVII.—*O'Connell again in Dublin: his promised reply to the adverse Opinion of the Law Officers not yet forthcoming: a new departure foreshadowed; a deputation to be sent to the Holy See.*

We have seen that even O'Connell's intimate friend, the editor of his organ in the press, acknowledged on the 13th of January that the Primate's publication of the letter which he had received from Rome, had removed the last of the reasons put forward by O'Connell for the postponement of his reply to the Law Officers of the Crown, adding that the reply might now be expected 'with the least possible delay.'[1]

O'Connell was then still in Kerry, but on the 19th of January he returned to Dublin, and, next day, he attended the ordinary weekly meeting of the Repeal Association.[2]

At this meeting he referred at some length to the letter, or 'Rescript,' as he preferred to call it, which the Primate had received from Rome,—that letter which, on the 6th of January, he had described as obtained from the Propaganda by Mr. Petre, English agent at Rome, and also as 'unfavourable to the Repeal agitation.'[3]

Upon this 'Rescript' he now spoke as follows:—

I am told that a Rescript has arrived from Rome prohibitory of the Repeal agitation.

I admit the fact of the arrival of the Reseript, but *I emphatically deny that it is prohibitory, in any respect, of Repeal* (cheers) . . .

No such interpretation belongs to the Reseript, which is, on the whole, *as mild, good-natured, and harmless a Rescript as ever was directed to any country.* . . .

As eonneeted, therefore, with the Repeal movement, dismiss the Rescript altogether from your thoughts, *for it has nothing whatever to do with it.*

[1] See p. 127.

[2] For the report of this meeting see *The Freeman's Journal* of January 21st, 1845, or *The Pilot* of the following day.

[3] See pp. 113, 114.

So much then, for the 'Rescript' which O'Connell himself had described, only a fortnight before, as '*unfavourable to the Repeal agitation.*' It would indeed have been by no means easy for anyone unacquainted with the facts of the case to infer that the interpretation against which he now so emphatically warned his hearers was his own !

In his speech at this meeting he also spoke at some length, in his usual denunciatory terms, of the Bequests Act. In his 'heart,' he said, and in his 'soul,' he was 'thoroughly convinced' that '*a more fatal measure never* was introduced *by any legislature.*'

And he continued :—

> The laity in each of the districts to which the Bishops who have accepted office under the Commission are attached, should approach their prelates and implore of them in the most respectful, but at the same time in the most earnest manner, to abandon the Commission and return to the heartfelt enjoyment of the unbroken affection of their flocks.

Furthermore, he denounced the Bequests Act as an obstacle 'thrown in the way of our peaceable agitation for Repeal.' And at this point, having also referred to the rumours then current about the establishment of a Concordat giving the British Government a right of interference in the appointment of Irish Bishops,[1] he spoke of the advisability of having recourse to a line of policy as yet untried.

> I think (he said) the Catholic laity ought to send two delegates to Rome to remonstrate with his Holiness, . . . to remonstrate against any contrivance affecting the people's liberties (hear), to assert that the Irish Catholics, in their struggles along with liberal Protestant patriots, ought not to be impeded in their course by any species of ecclesiastical censure or intervention whatever (cheers).
>
> I hope that some of the bishops will be sent on similar deputations. Let us quiet the thing and crush it for ever (cheers). The laity at all events will not hesitate.

[1] See p. 113.

And continuing, he said :—

I think I could name the two delegates who ought to be deputed by the Catholic people of Ireland (hear, hear). And I will name (cheers).

I think the Right Hon. Lord ffrench should be one; and though I may be laughed at for saying so, I think Mr. John O'Connell [1] should be the other.

The precise object of the proposed deputation was not very clearly indicated on this occasion. But eventually it became plain that one of the objects in view was to procure from the Pope a mandate directing the Primate, the Archbishop of Dublin, and the Bishop of Down and Connor, to resign the places they had accepted on the Bequests Board!

This object would undoubtedly have been attained without difficulty if O'Connell could but have made good the undertaking to which he had over and over again committed himself on the subject of the plunder of the property of the regular clergy,—a plunder in which he so confidently maintained it would be the duty of those three Bishops to take part if they continued to be members of the Board. But in his speech even on this occasion there was not the most remote allusion to the fulfilment,—already three times postponed,—of his promise to make good his public and emphatic statements on that subject.

After a brief interval it was announced in the public press that preparations were being made 'by the leading Catholics of Ireland,' to hold 'an aggregate meeting' at an early period. [2] The assembled Catholics were to take into consideration 'the danger with which the liberty of their clergy and the independence of their church' were 'threatened *by the recent legislation of the government*,'—in other words, by the recent enactment of the Bequests Act,—and also by the attempts made by the agents of the government

[1] O'Connell's eldest son.

[2] See *The Freeman's Journal*, January 24th, 1845.

'to influenee and overawe the Court of Rome by fabrieations, and threats, and promises.'

All this pointed plainly to the preparations that were to be made for the sending of the deputation to Rome, of whieh O'Connell had spoken at the meeting of the Repeal Association a few days before.

XXXVIII.—*Continuance of the agitation: Letter from the Arehbishop of Tuam to the Prime Minister.*

Meanwhile, week after week of January passed, leaving O'Connell's promise to reply to the Official Opinion of the Law Offieers upon the effect of the Bequests Act on the property of the regular elergy not only unfulfilled, but even ignored by himself.

There was now nothing to indieate that anything was fortheoming to relieve the heavy and inereasing strain that he was thus putting upon the patienee of his staunehest adherents. But their patience was all but inexhaustible, and, with but few exeeptions, they kept unshaken their faith in the prowess of the great leader, whose achievements in the past seemed to justify their unabated eonfidence that his hour of triumph over even the most formidable of his opponents was at hand.

In partieular, one strong supporter stood by him as steadfastly as ever.

On the 27th of January there was published in the newspapers an open letter of several columns addressed by the Arehbishop of Tuam to the Prime Minister, Sir Robert Peel.[1]

In this letter, the Prime Minister was earnestly exhorted to make the repeal of the Bequests Aet the first business of Parliament in the session then about to open.

[1] See *The Freeman's Journal* or *The Pilot* of January 27th, 1845.

Thus the Archbishop wrote :—

You have avowed that your difficulty was Ireland. Have you not increased and thickened those difficulties by this disastrous measure ?

Never within the memory of the oldest of its inhabitants was Ireland in a state of more frightful excitement. And why ? From the encroachment you have striven, but I hope in vain, to make on *the freedom of the Catholic religion* (!).[1]

And allow me to tell you in all sincerity that as you are now about meeting the Parliament, *your first measure must be the repeal, the total repeal, of that penal law, root and branch, if you wish to restore tranquillity to Ireland.*

That Dr. MacHale had lost none of his faith in the legal arguments put forward by O'Connell as sustaining his view of the Act, is plain from what follows :—

I will not fatigue you or the public attention with the detail of any of the arguments against this iniquitous law, arguments that are now as familiar as they are forcible.

The question has been so argued that persons the most illiterate, as well as the most enlightened, are in possession of those arguments, and hence an intellectual and religious opposition to the measure, deep, wide,—embracing all orders and all classes,—laity, clergy, priests, and bishops, gentry and peasantry,—in short, spread over the entire country, *and fast as the hold which their faith has on its people* (!).

And he added :—

Whoever can resist the evidence adduced by Serjeant Shee,[2] and principally by O'Connell,[3] of the ruinous effects of that law, if unrepealed, on the best interests of the Catholic religion, must have an understanding steeled by prejudice which no argument can approach.

[1] The influence of O'Connell's repeated statements regarding the legal aspects of the Bequests Act,—statements, the accuracy of which the Archbishop, naturally enough, never thought of questioning,—is manifest, not only in this passage, but throughout the letter.

[2] As to this, see pp. 124-126.

[3] From this reference it is manifest that the Archbishop's faith in the solidity of O'Connell's legal arguments against the Bequests Act was in no way shaken by the repeated postponements of his promised reply to the Law Officers.

XXXIX.—*Further meetings in Dublin and its neighbourhood: the projected deputation to Rome.*

Several meetings of protest against the obnoxious Act were held about this time in the city of Dublin or its immediate neighbourhood.

One of these took the form of a public dinner, the primary object of which was the raising of funds in aid of the building of the present Parish Church of Chapelizod.[1]

O'Connell presided on the occasion, and in proposing the toast of The Catholic Hierarchy and Clergy of Ireland, he coupled with it the name of 'a venerated friend' of his,—'the Most Rev. Dr. Murray.'[2]

In proposing this toast, and, indeed, in immediate connection with his references to Dr. Murray,[3] O'Connell dilated, as it might well seem, somewhat incongruously, upon the importance of the 'aggregate meeting' of the Catholics of Ireland that was about to be held for the purpose,—if, he said, the aggregate meeting agreed with him,—of sending two lay delegates to Rome.[4] And he again named the two laymen who, he thought, should be entrusted with the important mission,—Lord ffrench and Mr. John O'Connell.

[1] See *The Freeman's Journal* of January 24th, 1845.

[2] As Dr. Murray was not present at the dinner, this introduction of his name in connection with the toast of the hierarchy and clergy may seem strange, but it probably was in accordance with some accepted usage of the time.

[3] It is right to put on record here the terms of respect and admiration in which O'Connell in his speech on this occasion spoke of the Archbishop, not at all in vague terms of eulogy, but in reference to the leading part that he had taken in the resistance to the Veto, at a time when it was supposed by many to be favoured by the Holy See.

Speaking of Dr. Murray, he said:—'He may be mistaken in his views, for there are none of us infallible. But there is one thing certain: through a long series of years, in time of terror and danger, and when the Veto was almost pressed upon us with the concurrence of the Holy See, no man exerted himself with more zeal and efficacy, and with more martyrlike firmness, than Dr. Murray' (cheers).

[4] See p. 135.

But there was not even the most remote allusion to the fulfilment,—so often postponed, and on the last occasion[1] for 'a few days' only,—of his promise to make good his repeated statements that Dr. Murray and the two other Bishops who had accepted places on the Bequests Board had thereby taken upon themselves the degrading duty of despoiling the regular clergy of Ireland of all their property.

Another of the meetings held about this time in Dublin or its neighbourhood was held at Donnybrook on the 9th of February.[2]

O'Connell's speech on this occasion, was, in one respect, a notable one. It made plain the object of the contemplated lay deputation to Rome. On this point he said :—

> Before the last week of Easter (*sic*) we will have in Dublin an aggregate meeting of the Catholics of Ireland, and *if the prelates who are Commissioners under the Bequests Act do not resign before then*, we will appoint delegates to proceed to Rome to lay before the Holy Pontiff who is the head of the Catholic Church, a true statement of *the danger to religion* which this insidious Bill must create *if the Catholic prelates continue to have anything to do with it.*
>
> Lord ffrench and my son John will, I think, be chosen for that purpose (cheers).

XL.—*The promised reply to the Opinion of the Law Officers again postponed.*

We have now reached the early part of February, 1845, and we find O'Connell's promised justification of his Opinion and his reply to that of the Law Officers not yet forthcoming. The promise had been made on the 18th of December.[3] It was renewed on the following day,[4] and again on the 27th of that

[1] See p. 123.
[2] See *The Pilot* of February 10th, or *The Freeman's Journal* of February 12th, 1845.
[3] See p. 86. [4] See p. 91.

month, when the New Year's Day of 1845 was fixed for its fulfilment.[1]

When New Year's Day came, there was a further delay,[2] a delay of which no explanation was given until the 6th of January. The explanation then given was far from satisfactory,[3] and it involved, too, a further postponement. This postponement, however, was to be but a brief one, possibly for not more than a day.[4] But when four days had passed, there was a further postponement! This was stated by O'Connell to be 'for a few days' only.[5]

The date of this last postponement was the 10th of January, and the three weeks interval between that and the end of the month passed without bringing from O'Connell either the promised refutation of the Law Officers' Opinion, or any explanation of his strange and irritating delay in giving that refutation to the public. The delay, not at all unnaturally, was now at length beginning to shake the faith of not a few even amongst the most devoted of his adherents.

It would almost seem as if, on taking in hand the fulfilment of the promise he had made to his followers and to the public, he had found that he had undertaken to do an impossibility, that he was wrong in his reading of the Bequests Act, and that the position of those who, like Dr. Murray, relied upon the Opinion officially given by the Law Officers, was unassailable. This, at all events, would seem to be an intelligible account of a situation otherwise inexplicable.

O'Connell's supporters, naturally slow as they were to move in any way that might embarrass him, could but await the course of events. But he was soon driven to action by the taunts of a bitter and not over-worthy opponent, who, in a public letter, upbraided him with having run away from a contest which he had himself defiantly provoked.[6]

[1] See p. 106. [2] See p. 110. [3] See pp. 112, 113.
[4] See p. 121. [5] See p. 123.
[6] See *The Freeman's Journal* of February 1st, 1845.

He naturally felt called upon to take notice of this reproach, and, some days afterwards, in the course of a speech at a meeting of the Repeal Association on the 10th of February, when his repeatedly-promised reply to the Law Officers was hopelessly overdue, he referred to the Bequests Act and its effect upon the property of the regular clergy in the following extraordinary fashion:—

> The Act has considerably injured the friars.
> *I am told* (*!*) that it does them no harm, and *that lawyers' Opinions have been given to that effect.*
> *I had not leisure to consider that yet* (*!*) but *before a week elapses,* I will have *time to examine it* (*!*).[1]

How sadly disappointing this infelicitous plea must have been to those whose confidence in O'Connell's ability to vindicate the correctness of his view of the law, to refute triumphantly the official Opinion of the Law Officers, and to cover its authors with confusion, had never for a moment wavered. They had been encouraged in that confidence by the contemptuous tone of his references to the Law Officers.

Their view of the law he had stigmatised as 'strange and fantastic.'[2] Their action in formulating that view he had described as 'shuffling.'[3] And the presentation of such a view to Dr. Murray he had ridiculed and denounced as an unworthy attempt 'to deceive and delude so estimable a character as his Grace.'[4]

And now he apparently saw nothing discreditable in stating that as yet he had had no time to 'consider' the views he had thus denounced. What, then, was to be thought of the explanations which he had been putting forward from day to day, and from week to week, to account for the non-appearance of his promised reply to the Law Officers? Were they anything better than mere excuses?

[1] See *The Freeman's Journal* of February 11th, 1845, or *The Pilot* of the following day.
[2] See p. 106. [3] See p. 116. [4] See p. 106.

But hard as it would be to answer such questions as these, it was still harder to account for his statement, now made, that, as to the Opinion which he had so severely stigmatised six weeks before, he had only been 'told' that such an Opinion had been given!

But, however all this may have been, he now asked only for the further delay of a week; and those who were still able to convince themselves that something worth waiting for was now at length forthcoming, had no option but to wait another week as patiently as they could.

XLI.—*The end.*

It may be assumed that not many of O'Connell's supporters in the agitation against the Bequests Act now entertained a hope that, in the face of the sensational admission that had just been made by him, the agitation could be kept alive much longer. But it may also be assumed that there were but few, if indeed there were any, even amongst his opponents in the matter who supposed that the end of the agitation was at hand, and that its collapse would be so sudden and so complete.

In his speech at the meeting of the 10th of February, he had suggested that he should have a week to consider the Opinion which, he said, he was 'told' had been given by the Law Officers. But that suggestion was, it seems, his last reference to the matter. At least it does not appear that he ever referred to the Opinion of the Law Officers in public again.

It remains only to add that the deputation to Rome, so confidently spoken of by him at the Donnybrook meeting on the 9th of February, never was sent. The 'aggregate meeting of the leading Catholics of Ireland,' from which the deputation was to be accredited, never was held. Indeed, by the time

that Easter,—the date fixed by O'Connell for the holding of that meeting, and for the sending of the deputation to Rome,—came round, it seemed to be the very general desire of those who had taken a leading part in the agitation, that the agitation itself, and everything calculated to keep the memory of it alive, should, as speedily and as effectively as possible, be buried out of public view.

As for O'Connell himself, he never either attempted to make good the offensive imputations which he had so recklessly cast upon Dr. Murray, nor did he withdraw them; and Dr. Murray was not a man to emphasize a triumph over an opponent whose attack had failed.

But no withdrawal of the imputations was needed. The facts spoke for themselves. The new Act was soon in full operation, and before many months it was plain to all Ireland that the alleged inevitable spoliation of the regular clergy was a myth. Their property was not plundered by the Commissioners. And no one any longer believed that it was in the least danger of being plundered.

In face of such a state of facts, it was impossible to keep up the agitation. For some little time longer, here and there throughout the country, fitful efforts were made to revive it.[1] But the utter hopelessness of every such effort soon came to be recognised, and after one or two final convulsive struggles, the agitation, which not many weeks before had seemed so full of vigour, ignominiously collapsed.

[1] For an account of one curious incident, speedily brought to an end by a letter from Dr. Murray, see Appendix Q.

APPENDIXES

APPENDIX A.[1]

THE ARCHBISHOPRICS AND BISHOPRICS OF THE PROTESTANT ESTABLISHED CHURCH OF IRELAND: THE IRISH 'CHURCH TEMPORALITIES ACT' OF 1833.

By the 'Church Temporalities Act' of 1833, the number of archbishoprics in the Established Church of Ireland was reduced from four to two, and the number of bishoprics, from eighteen to ten.[2] The reduction was effected by the amalgamation of certain bishoprics according as sees became vacant, and by the transfer, similarly, of the metropolitan jurisdiction of Tuam, with its suffragan sees, to Armagh, and that of the metropolitan jurisdiction of Cashel, with its suffragan sees, to Dublin.

The active concurrence of Dr. Whately, then Protestant Archbishop of Dublin, in the suppression of ten ancient sees by the civil authority, was the occasion of a reproachful letter to him from Dr. Newman, then a Fellow of Oriel.

Whately had written to his old college friend to tell him of a report, said to be in circulation in Oxford, that when Whately was on a visit at Oriel some months before, Newman, to avoid receiving the Communion with him, had absented himself from service in the college chapel, and had, moreover, himself declared that he had done so. Referring to their 'long, intimate, and confidential friendship,' Whately asked to be assured that the report was unfounded.

[1] See p. 4.

[2] In addition, the income of the Archbishop of Armagh was, by the same Act, reduced by £4,500 a year, and that of the Bishop of Derry by £6,160 a year, leaving the reduced net annual incomes of those two sees, respectively, £14,400 and £12,000.

On all other archbishoprics and bishoprics a graduated tax was imposed, at a percentage ranging from 5 per cent., where the yearly value did not exceed £4,000, up to 15 per cent., where the yearly value did not exceed £10,000; and a percentage was also charged upon all benefices and dignities above £300 a year in value.

But the amount resulting from these various reductions and charges was not withdrawn from the Church. It was vested in a Board of Commissioners incorporated under the name of the 'Ecclesiastical Commissioners for Ireland,' to be applied by them from year to year 'to the building, rebuilding, and repairing of churches, and other such like ecclesiastical purposes, and to the augmentation of small livings, and to such other purposes as may conduce to the advancement of religion, and the efficiency, permanence, and stability, of the Church.'

For the first twenty years of the working of the Commission, the income thus placed at its disposal amounted to over £2,000,000.

Newman, in reply, gave the assurance asked for, but went on to express very plainly his views about his old friend's recent proceedings :—

'On honest reflection I cannot conceal from myself that it was generally a relief to me to see so little of your Grace when you were in Oxford. . . .

'I wish I could convey to your Grace the mixed and painful feelings which the late history of the Irish Church has raised in me,—the union of her members with men of heterodox views, and the extinction (without ecclesiastical sanction) of half her candlesticks, the witnesses and guarantees of the covenant. . . .

'I am conscious to myself that I am acting according to the dictates both of duty and of gratitude, if I beg your leave to state my persuasion that the perilous measures in which your Grace has acquiesced are but the legitimate offspring of those principles, difficult to describe in few words, with which your reputation is associated,—principles which bear upon the very fundamentals of all argument and investigation, and affect almost every doctrine and every maxim on which our faith and our conduct depend.' [1]

APPENDIX B.[2]

THE PREROGATIVE COURT : THE COURT OF PROBATE.

The Prerogative Court was a court in which was exercised, down to 1858, an important part of the jurisdiction relating to the probate of wills, and the administration of the personal property of intestates.

Until 1858, both in England and in Ireland, the granting of the probate of wills and the administration of the goods of intestates belonged, in ordinary cases, to the ecclesiastical jurisdiction, vested, for these purposes, in the bishop of the diocese to which the deceased belonged,[3] and exercised by the bishop, personally or by deputy, in his diocesan Consistorial Court. If, however, the deceased had died possessed of *bona notabilia*,—which was taken to mean personal property to the value of £5,—in a diocese other than that to which he belonged, the case passed from the diocesan to the provincial jurisdiction, and was dealt with by the archbishop,—acting, as a rule, by deputy,—in his provincial Court of Prerogative.

[1] See the letter in *Dr. Newman's Letters and Correspondence*, ed. A. Mozley (London, 1898), vol. ii. pp. 61-63.

[2] See p. 4.

[3] When the State became Protestant, this, of course, meant the Protestant bishop.

Thus, in England, there were two Prerogative Courts,—those, respectively, of the Archbishops of Canterbury and York.

Except as to the prerogative jurisdiction and its exercise, the arrangements regarding the jurisdiction over probates and intestacies was substantially the same in Ireland as in England.

It was no easy matter to establish in the Protestant State Church of Ireland an organised system of prerogative jurisdiction. Even in Elizabeth's time, the making of such a system was found to be impossible. It was not until the reign of James I that an arrangement was made which lasted on, with but few modifications, into modern times.

In that reign, in 1622, the King granted the prerogative jurisdiction for Ireland to Christopher Hampton, Protestant Archbishop of Armagh (1613-1624) and his successors for ever. The jurisdiction thus granted was consolidated, and in certain particulars enlarged, in 1625, and again in 1630, by letters-patent of Charles I, in favour of Hampton's successor, the learned James Ussher, who was Archbishop from 1624 to 1655.

The Archbishops of Armagh were expressly authorised to exercise the prerogative jurisdiction for Ireland by deputy. The deputy's title, as regarded his jurisdiction in this matter, was 'Judge, or Commissary, of *His Majesty's Court of Prerogative in Ireland.*' This Irish Court, it will be observed, unlike the Prerogative Courts of Canterbury and York, was styled a court of the King.

The court sat in Dublin, and, by arrangement between the Protestant Archbishops of Armagh and Dublin, the same person,—a Protestant lawyer of distinction,—was usually appointed as Judge both of the Prerogative Court and of the diocesan Consistorial Court of Dublin. The position was a highly lucrative one, and it was one of those to which Catholics were not admitted by the 'Emancipation' Act of 1829.[1]

Until 1858, then, it was only in the Prerogative Court, thus constituted, or in the diocesan court of a Protestant bishop, that probate of the will of an Irish Catholic,—or, in the event of his dying intestate, the administration of his goods,—could be granted. Over and above this fundamental grievance in the case, there were others that called for redress. The way in which the business of the Prerogative Court was conducted was much

[1] Catholics were excluded even from practising in the Prerogative Court, whether as solicitors or as barristers,—called, in that court, proctors and advocates, respectively. But a Catholic barrister might be brought in if additional help was needed in a case in which there were already two qualified 'advocates' employed.

complained of as being both dilatory and costly. But it was not so much on these grounds, as because there was an uprising of public opinion in England against the exercise of the jurisdiction over wills and intestacies by the ecclesiastical courts, that a radical change was at length made.

By an Act of 1857,[1] the jurisdiction over wills and intestacies, in England, was transferred to a new secular Court of Probate. In the same session an Act was passed making a similar change in Ireland.[2] Thus, in both countries, the prerogative jurisdiction was abolished, and, with it, the Prerogative Courts.

In the Irish Act of 1857 it was provided that the Judge of the Prerogative Court at the time of the passing of the Act should be the first Judge of the new Court of Probate. This Act also provided that,—in lieu of the Judge of the Court of Prerogative,—the Judge of the Court of Probate should be *ex officio* a Commissioner of Charitable Donations and Bequests in Ireland.

But this arrangement lasted only until 1861. In that year an Amending Act was passed[3] by which the Judge of the Probate Court ceased to be an *ex-officio* member of the Board,[4] and the number of 'appointed' members was increased from ten to eleven.

APPENDIX C.[5]

CORPORATIONS AND CORPORATE BODIES.

A Corporation, in the legal sense of the word, is a fictitious person, invested by the law with the character of perpetuity.

Corporations are either 'sole' or 'aggregate.'

A corporation 'sole' consists, at any given time, of one person only,—the holder, for the time being, of some office or position, the successive holders of which are regarded in law as forming but one person, just as if the office were held throughout all time, not by a succession of individuals, but by one individual only. By thus investing the office with this attribute of continuity,—or, in legal phrase, 'incorporating' it,—the law confers on the succession of individuals, as a whole, those legal capacities and advantages which, if the office were not incorporated,

[1] 20 and 21 Vict., c. 77. [2] Ibid., c. 79. [3] 24 and 25 Vict., c. III.

[4] Eventually, both in England and in Ireland, under the operation of the Judicature Acts, the Probate Court, as a separate court, ceased to exist.

In England it has been merged in the 'Probate, Divorce, and Admiralty Division' of the High Court. In Ireland it is not represented by a separate Court or Division: its business is transacted by a Judge of the King's Bench Division.

[5] See p. 5.

would belong only to an individual holder of it. Thus property vested in proper legal form, in the Bishop, for instance, of Ely, —each bishopric of the State Church of England being by law an 'incorporated' office,—would pass on, without any need of legal transfer to the successive bishops of that see, as long as the see existed.

In the English Constitution, the Sovereign is a corporation sole. So is the bishop of a diocese, or the rector of a parish, in the State Church of England. So was the bishop of a diocese, or the rector of a parish, in the Protestant Church of Ireland, as long as it was an Established Church. And so would the bishop of a diocese, or the parish priest of a parish, have been in the Catholic Church in Ireland if O'Connell's Bill, mentioned in the preceding pages,[1] had been passed into law.

A corporation 'aggregate,'—or body corporate, as it is also called,—consists of a number of persons united in a body, which, as a body, is invested by the law with the character of perpetuity.

If property is vested in such a body, the result of its incorporation will be, that when individual members cease to be members of it by death or otherwise,—their places being filled by co-option, or in whatever other way is prescribed by the constitution of the body,—the property continues automatically vested in the body without a break.

The original members of the incorporated body and their successors for all time, are considered one person in law, 'in like manner,'—to borrow Blackstone's classic statement of the legal conception of a corporation,—'as the river Thames is still the same river, though the parts which compose it are changing every instant.'[2]

Examples of such corporations are not far to seek. To take a few at random:—The National University of Ireland is such a corporation; so is each of its Constituent Colleges; so also are 'the Trustees of the College of Maynooth'; 'the Provost, Fellows, and Scholars' of Trinity College, Dublin; and 'the Senate' of the University of Dublin, under the title of 'the Chancellor, Doctors, and Masters of the University of Dublin';[3] and so on.[4]

[1] See p. 17. [2] Blackstone, i. 468.

[3] On the relation, as well as the distinction, between Trinity College and the University of Dublin,—matters very generally misunderstood, —see the masterly and exhaustive 'Note' appended by the Right Hon. the Lord Chief Baron to the Report of the Royal Commission of 1906-7, 'on Trinity College, Dublin, and the University of Dublin.' (Final Report, pp. 61-72.)

[4] In not a few cases the term Corporation is inaccurately applied. Thus, in the case of Dublin, the term is commonly applied to the

It has been said with truth that the legal idea of a corporation is perhaps the most fruitful of the inheritances that have come down to us from the old Civil Law of Imperial Rome. In Roman law, the word used to designate a corporation was *universitas*.[1]

But we are cautioned against supposing that the now familiar legal theory of corporations lay so plainly written on the face of the Roman law-books that no one could read them attentively without grasping it.[2]

Some of the most famous jurists of the great legal University of Bologna failed to grasp it.[3] Not so the canonists. It was they who first grasped it.

Bracton's contemporary, Innocent IV (Sinibaldus Fliscus, of the Genoese family of the Fieschi), 'perhaps the greatest lawyer among all the Popes,' has been styled 'the father of the modern learning of corporations.' [4]

Innocent IV was Pope from 1243 to 1252.

APPENDIX D.[5]

CY-PRÈS.

Cy-près implies nearness or approximation, and, as a legal term, it is most commonly used to indicate the application of a charitable gift to a purpose resembling as nearly as possible the purpose assigned by the donor, that purpose having failed.

In English law, *cy-près* application is a privilege confined exclusively to gifts for charitable purposes. If a testator bequeaths a gift to a personal friend who happens to die before him, the bequest necessarily fails. Not so a bequest for a charitable purpose. Thus, if there is a bequest of £1,000 in favour of a hospital which ceased to exist before the death of

body by which the business of the city is transacted in the City Hall. But that body is, not the Corporation, but the Municipal Council, of Dublin. The Corporation of Dublin consists of the 'Lord Mayor, Aldermen, and Burgesses' of the city.

[1] Even in many modern centres of classical learning, 'universitas' is used at times as if that word, without qualification of any sort, was good Latin for the English word 'University.'

[2] On all this, see Pollock and Maitland, *History of English Law*, vol. i. p. 477.

[3] 'The glossators did not grasp it. Bracton's master, Azo, had not grasped it.'—P. and M., ibid.

Azo, an ecclesiastic, and a leading jurist of Bologna, died between 1234 and 1236.

Bracton, an ecclesiastic and a judge, of the reign of Henry III, died in 1268. His great work on the common law of England has been described in terms of splendid eulogy as 'the crown and flower of English medieval jurisprudence' (P. and M. i. 185).

[4] See P. and M. i. 103, 477. [5] See p. 5.

the testator, that bequest will not necessarily fail; for, under certain conditions, such a bequest may be applied *cy-près*, that is to say, applied to some other charitable purpose, resembling, as closely as may be, the purpose that has failed.

But it must not be supposed that the mere fact of a gift having been bequeathed for a charitable purpose is sufficient to secure that, if that purpose fails, the gift will be applied *cy-près*.

The theory underlying the *cy-près* doctrine is that the charitable bequest may be an indication of *a general intention to give to charity*, the bequest itself denoting *the particular mode selected by the testator* to give effect to that general intention. In such a case,—'*charity*' being regarded in law as *the legatee*,—the failure of the particular charitable purpose named in the bequest will not destroy the bequest, for the law will substitute *another mode* of devoting the gift to charity, thus giving effect to the testator's *general charitable intention*, although his intention as to *the particular mode* of giving effect to that intention cannot be accomplished.

But, of course, unless there is some sufficient indication of a general charitable intention, the *cy-près* principle cannot be applied. *De non apparentibus et non existentibus eadem est ratio.*

From what has so far been said it is sufficiently plain that, whether as to deciding that a particular case is, or is not, one for a *cy-près* application, or as to selecting a purpose to which a charitable bequest that is to be applied *cy-près* should be applied, there is room for considerable divergence of view.

But this is a matter that does not directly affect the general public. *A cy-près* application can be made only by a Judge of the Chancery Division, or,—within certain limits,—in England by the Charity Commissioners, and in Ireland by the Commissioners of Charitable Donations and Bequests.[1]

It should, however, be added that, in the scientific aspect of the law, there are few things of greater interest than the method followed by the courts in the application of the *cy-près* principle in some of the reported cases.

One of these may be mentioned here: *The Attorney-General* v. *The Ironmongers Company*.[2]

The case, which is one of the most notable and interesting cases of *cy-près* application that ever came before the courts, arose out of a will of a Mr. Zozimus Belton, a wealthy and charitable merchant of London.

[1] See Appendix G.

[2] The references in the Reports to this case in its principal stages are the following: 2 My. and K. 577; 2 B. 313; Cr. and Ph. 208; (1844) 10 Cl. and F. 908.

By his will, made in 1723, Mr. Belton bequeathed a residuary fund of over £20,000 to the Ironmongers Company, upon trust to apply the interest each year to three specified charities. The first was the redemption of British slaves in Turkey or Barbary, and to this, one-half of the interest of the fund was to be applied. The remaining half of the interest was to be divided equally between the two other charities named in the will. These were: (*a*) assisting charity schools in London and its suburbs, in which the education was 'according to the Church of England'; and (*b*) assisting certain charities in London maintained by the Ironmongers Company for the benefit of its members, especially of its decayed members.

The question that arose had reference only to the first of the three charities. For a time there was no difficulty in applying the money to the purpose specified, but the number of British slaves in Turkey and Barbary gradually fell off, until eventually there were none. A *cy-près* application of the fund was then sought for, and the case came into court in 1829.[1]

The case was before the courts for fourteen years, from 1829 to 1843, and during that time it was adjudicated upon, or otherwise dealt with, by three successive Masters of the Rolls, and two successive Lord Chancellors. It was finally decided by a unanimous judgment of the House of Lords.

At different stages of the prolonged litigation, a perplexing variety of claims on behalf of over seventy charities had to be considered. One of these, the decision upon which is particularly instructive, may be mentioned here. This claim was that the amount of the bequest which had failed should be applied in augmenting the amounts assigned by the testator to the two other charitable purposes specified in the will.

Lord Langdale, Master of the Rolls, decided in favour of this claim but his decision was reversed by the Lord Chancellor, Lord Cottenham, on appeal. 'It is,' said Lord Cottenham, 'obviously true that if several charities be named in a will, and one fails for want of objects, one of the others *may* be found to be *cy-près* to that which has failed, and, if so, its being approved by the testator ought to be an additional recommendation. But such charity ought not, I conceive, to be preferred to some other *more nearly resembling that which had failed*.'[2]

[1] In the meantime the interest upon the portion of the fund assigned to the redemption of British slaves had been allowed to accumulate, with the result that when the case was brought into court, the interest of that particular portion of the fund, with the interest on the accumulations, amounted to £3,500 a year.

[2] Cr. and Ph. 222.

Coming, then, to the will before him, Lord Cottenham pointed out that the first charity was most general in its objects, 'being applicable to all British subjects who should happen to be in a particular situation, namely, that of being slaves in Turkey or Barbary' ; the second was 'limited to persons in London and its suburbs' ; the third was confined to 'members of a particular London company.' He could not, he said, regard it as 'consistent with the nature of a *cy-près* application that a fund to the benefit of which the people of no one district had any claim should be added to a fund the benefit of which was confined to the people of London and its suburbs, or to a fund for the benefit of the members of a particular London company.[1]

But applying a gift that had failed to other purposes to which gifts were made by the testator in his will was one thing : looking to the will to discover whether the testator had indicated a preference for any 'particular form of charity,' was something quite different. On this ground, Lord Cottenham considered that the bequest in aid of charity schools could be taken as 'indicative of one kind of charity preferred by the testator.' Taking this, then, as a basis, he applied the fund to the assistance of charity schools, the education in which was 'according to the Church of England,' not, however, those of London and its suburbs only, but of those in any part of England or Wales.[2]

In giving his decision, he took the opportunity of pointing out that a charity may be *cy-près* to the original object, whilst it 'seems to have no trace of resemblance to it,' and that such a charity may be selected by a judge in the exercise of his judicial discretion, '*if no other can be found having a nearer connection.*'

And he added :—

'Providing for the education of the poor, it may be said, has no resemblance to the object of the charity which has failed ; but none has been suggested which unites the two qualities which induce me to adopt it,—namely, the application of the fund *in a manner of which the testator has expressed a preference,* for the *benefit of all British subjects who may stand in need* of them.'[3]

The case was then brought to the House of Lords, where it was argued before a tribunal of four Lords,—The Lord

[1] Cr. and Ph. 227.

[2] A certain sum was set apart to provide for the redemption of any British subjects who might thereafter be held in slavery in Turkey or Barbary.

[3] Cr. and Ph. 227.

Chancellor (Lyndhurst), and Lords Brougham, Campbell, and Cottenham.

There was some little hesitation, for, as Lord Campbell said, 'if education in England be next to the redemption of slaves in Barbary, it is next at a great interval.' [1] But his judgment was in favour of Lord Cottenham's decision, and that decision was unanimously upheld.

It appeared plainly that some of the Lords would have preferred some other application of the fund more nearly resembling the one that had failed. But the exercise of the *cy-près* jurisdiction is to a large extent discretionary, and, as Lord Lyndhurst expressed it, it would be very difficult in a case such as that before the House 'to say that you should set aside a decree that is actually pronounced; because, after all, it would be substituting conjecture and discretion for conjecture and discretion.' [2]

It had been urged by counsel that this was precisely what Lord Cottenham had done when, as Lord Chancellor, he had set aside the decree of the Master of the Rolls (Lord Langdale) whose decision had been given in favour of the two other objects mentioned in the will.

But to this it was replied that Lord Langdale's decision was given, not in the exercise of his judicial discretion, but under a mistaken belief that Lord Brougham, when the case was before him as Lord Chancellor in one of its early stages, had decided that the fund should be so applied,—the fact being that Lord Brougham, on the occasion in question, had decided only that the case was one for *cy-près* application that being the only point then before him for decision.

APPENDIX E.[3]

THE BUSINESS METHODS OF THE BEQUESTS BOARDS OF 1800 AND 1844 CONTRASTED.

The first Annual Report of the Bequests Commissioners incorporated under the Act of 1844,—that is to say, their Report for the year 1845,—throws an instructive light upon the way in which the charities entrusted to the care of their predecessors had been cared for and administered.

1. A large amount of business that naturally belonged to the Board itself or to its Secretary was handed over to the Board's Solicitors.

Thus the Solicitors,—presumably at a cost ultimately borne

[1] 10 Cl. and F. 925. [2] Ibid. 925. [3] See p. 6.

by the charities concerned,—were charged with the receipt and disbursement of parts of the charity-funds under the control of the Commissioners ; they were referred to for their report on a great many cases ; and '*their constant attendance and professional assistance*' *were required at the meetings of the Board !* [1]

The result of all this was that,—although it may be assumed that the Solicitors presented their bills of costs at reasonable intervals, and were paid accordingly,—the Solicitors' bill remaining over to be paid at the dissolution of the old Board in 1844 was for the enormous amount of £5,926 18*s.* 9*d.*

A certain amount of this was incurred in proceedings taken in court by the Commissioners for the recovery of bequests improperly concealed or withheld,—which, in their time, seem somehow to have amounted to about £3,000 or £4,000 a year ! The costs thus incurred were officially taxed by direction of the new Commissioners, with the result that their amount was 'diminished but in a very slight degree,' which, the Report goes on to remark, 'affords satisfactory evidence of the fairness of the charges.'

Charges for other services rendered to the Commissioners were not taxed : by direction of the Lords Commissioners of the Treasury, the bills for all such costs were forwarded to them.

2. A new office,—that of Treasurer to the Board,—was illegally created by the Commissioners, and the Secretary, who seems to have been relieved of some of the duties of his office, was appointed Treasurer, with the substantial remuneration of a poundage rate of 2½ per cent. on all moneys received by him for the Commissioners.[2]

This percentage was paid to the Secretary, as Treasurer, down to the year 1837, when the old Commissioners, 'being advised that they had not power to make him such allowance, ceased to give him any compensation for his services as Treasurer, but required him to continue to act as their Treasurer upon an understanding that they would cause an application to be made to Government for such compensation.' [3]

[1] The words and passages within quotation marks in this Appendix are quoted from the first Annual Report of the new Commissioners.

[2] An estimate of the amount of the remuneration thus paid to the Secretary, in his capacity of Treasurer, may be formed from the fact that the amount received by the Commissioners in the year 1845 was, in round numbers, £24,000. Payment on this sum, at the rate of 2½ per cent., would have amounted, for the year, to £600.

[3] The old Commissioners do not seem to have made any application in the matter. If they did, it was unsuccessful. Their successors, in their first Report, stated that, in view of the Secretary's agreement with the old Board, he had, they considered, a claim which should be considered by the Treasury. To some extent, at all events, their intervention was successful.

3. The most serious charge against the old Commissioners was, that having appointed their Secretary to act as their Treasurer, they allowed the funds received by him to lie in his hands without requiring him 'either to furnish his accounts, or pay in his balance.'

Thus, when the new Commissioners entered upon their duties, they found that amongst the charity-funds under the control of their predecessors was '*an unascertained sum*' in the hands of the 'Treasurer'!

Of course the new Commissioners could not allow this irregularity to continue. They called upon the Secretary for his accounts, and when these were furnished, they had them examined by a competent Accountant. He certified that they were perfectly correct, and that the balance was correctly shown. In view, no doubt, of the abnormally loose system, under which the Secretary had worked for years, the Report does him the justice of saying that the Commissioners considered the accounts 'very creditable' to him.

As to the balance due by him to the Board, his accounts show that it was £4,099 16*s.* 4½*d.*; 'towards the liquidation of which,' the Report continues, he 'has already paid to our credit a sum of £3,004 5*s.* 4*d.*, leaving a balance still due by him of £1,095 11*s.* 0½*d.*'

The whole matter had, of course, to be considered by the Treasury, and the Lords Commissioners eventually decided that it would not be equitable to require the Secretary to pay more than £225 7*s.* 11*d.* in addition to the £3,004 5*s.* 4*d.* which he had already paid. This showed that favourable consideration was given to the view expressed by the new Commissioners in their Report, that he was entitled 'either to the arrears of per-centage due to him under his agreement with the late Board, or to some other adequate remuneration for his services as Treasurer.'

The appointment of the new Board in 1844 led, as a matter of course, to the adoption of a totally new system of working, based upon business principles, in place of the costly and ineffective methods of administration which it replaced.

As to the legal expenses, everything superfluous was cut off. It was arranged that, in any case requiring for its satisfactory treatment special legal knowledge and special care, one or other of the legal members of the Board [1] would take charge of the papers in the case, and after considering them carefully, report his view of it to the Board. Thus the cases in which it is necessary

[1] At present there are, amongst the members of the Board, five Judges of the High Court, and a leading member of the inner Bar.

to take the opinion of counsel, or even the advice of the Board's Solicitors, at once became very rare.

But perhaps the greatest reform is that effected in the financial arrangements of the Board.

Even in their first Annual Report, the new Commissioners were able to state that, by an arrangement for which they expressed their indebtedness to the Bank of Ireland, they had been able 'to dispense with the appointment of a Treasurer.' The Bank, in fact, undertook to act without charge as the Board's Treasurer.

The arrangement is a simple one. It works smoothly. It affords the best possible security. And it has admirably stood the test of time.

APPENDIX F.[1]

THE CONSTITUTION OF THE BEQUESTS BOARD OF 1844 AS CHANGED IN 1861.

In one of the few manuals that have been published on the Law relating to Charities in Ireland, it is stated that the object aimed at by the legislature in the establishment of the Bequests Board in 1844 was '(*a*) religious equality, and (*b*) legal capacity.'[2] This object, the author of the work goes on to say, 'has been *well-accomplished.*'

This statement, as far as it relates to 'religious equality,' should not be allowed to pass without contradiction.

In the case of a body consisting of thirteen members, the establishment of equality, as regards the religion of its members, is, of course, in one sense, an impossibility.

But the case of the Bequests Board is a special one. In the original constitution of the Board, its thirteen members were, three of them *ex officio* members, and ten appointed by the Crown.

As the three *ex officio* members were the holders of judicial offices, two of which were open to Catholics, equality, in a somewhat loose application of the word, might perhaps be said to be accomplished, if, as regards the ten appointed members, the original constitution of the Board, as defined in the Act of 1844, had been adhered to: '*ten* proper and discreet persons, . . *of which ten* persons, *five and not more than five*

[1] See p. 11 (1).

[2] Hamilton, *The Law relating to Charities in Ireland* (Dublin, 1881), p. 224.

shall at all times be persons professing the Roman Catholic religion.' [1]

At this point it may be useful to see how the constitution of the Board, as regards the religious professions of its members, has stood from the beginning, first as to the *ex officio*, and then as to the appointed, members.

At first, all three *ex officio* members were Protestants, one of them,—the Judge of the Prerogative Court,—necessarily a Protestant.[2]

In 1846, by the appointment of a Catholic,—the Right Hon. D. R. Pigot,—as Lord Chief Baron, there was one Catholic amongst the three.

In 1861, as already stated, the Judge of the Probate Court ceased to be an *ex officio* member of the Board,[3]—the number of those members being thus reduced to two,—of whom, one, the Master of the Rolls, was a Protestant, the other, the Lord Chief Baron, a Catholic.

This equal division as to religious profession amongst the *ex officio* members continued unchanged until 1913, when, as a result of the appointment of the Right Hon. C. A. O'Connor as Master of the Rolls, the *ex officio* positions on the Bequests Board were, for the first time in sixty-nine years, held by Catholics.

But in view of what has occurred in reference to the appointed, as distinct from the *ex officio*, members, it is difficult to see how the present constitution of the Board has been allowed to stand so long without protest.

In 1861, when the Judge of the Court of Probate ceased to be

[1] In *The Life of the Most Rev. Dr. MacHale, Archbishop of Tuam*, to the marvellous inaccuracy of which reference has more than once been made in the preceding pages, we find (see *The Life*, vol. i. p. 552) the following curious account of the constitution of the Bequests Board, as originally formed :—

'The principle of the new Bill was to place Catholic donations and bequests in the hands of a Board of Commissioners created by the Act. [But the Act affects Protestant and Catholic charities alike. And it puts into the hands of the Board no donations or bequests that are not put there by the donors or their representatives.]

'The Board consisted of two Irish judges, and ten other Commissioners,—twelve in all. [This again is incorrect: the numbers should be *three* Irish judges (see p. 11) and ten other Commissioners,—*thirteen* in all],—of whom not more than five should at any time be Catholics. . . .

'Thus there must, at all times, be a majority of non-Catholics on the Board.' [Evidently the writer mis-read the Act, taking the words 'five and not more than five' as applying to the Board as a whole, whereas those words, as is expressly stated in the Act, apply to the ten appointed Commissioners only.] See, as to all this, p. 16*, n. 1.

[2] See Appendix B., p. 3*.

[3] See p. 4*.

an *ex officio* member of the Board,[1] if no other change in its constitution had then been made, there would have remained a Board of twelve members, two *ex officio*, and ten appointed. And as it happened, six of the twelve Commissioners,—one *ex officio* and five appointed,—were Catholics, and the other six, Protestants.

This, however, would have given Catholics and Protestants equal numbers on the Board, and, as it would seem, to prevent as far as possible such an occurrence, a curious device was had recourse to. An Act of Parliament was passed, doing away with the *ex officio* Commissionership of the Judge of the Probate Court, and *increasing the number of appointed members from ten to eleven*.[2]

The vacancy thus created was filled, as a matter of course, by a Protestant gentleman,—a Protestant official, in fact, Dr. Ratcliffe, the Judge of the diocesan Consistorial Court of the Protestant Archbishop of Dublin!

This made the numbers of the appointed members, six and five,—Protestants and Catholics, respectively, instead of five and five, the statutory arrangement under the Act of 1844.[3] And, as anyone can see for himself who will take the trouble of looking through the lists of the Commissioners in Thom's Directory, from year to year, that indefensible inequality has been kept up, unbroken and unshaken, to the present day.

So much for 'religious equality,'—'well-accomplished' religious equality,—as the principle is understood and applied in Ireland.

The fantastic notion of 'religious equality' that seems to have commended itself to the author of the manual referred to in the preceding pages, is well illustrated by an observation of his, that 'the constitution of the Board of [Bequests] Commissioners is composed *as nearly as possible* of *an equal number* of Protestants and Roman Catholics.'[4]

[1] See p. 4*.

[2] 24 & 25 Vict. c. 111.

[3] I trust I shall not be taken as suggesting that the half-and-half arrangement, as between Catholics and Protestants, in the appointment of Boards and Commissions in Ireland is in itself a satisfactory or an equitable one.

If that system were adopted equally all round, the case would be different. But on what ground can it be maintained that the system is fair in its application to Ireland, whilst, as everyone knows, any statesman who would venture to apply that system in England,—where it would serve as a measure of protection for the Catholic minority in that country,—would soon find himself at the end of his political career.

But, fair or unfair as the system may be in itself, it is simply intolerable that the Catholics of Ireland are denied the benefit of it.

[4] Hamilton, p. 221.

'As nearly as possible, an equal number' of Protestants and Catholics! As if 'six and five' could be nearer to equality than 'six and six,' or 'five and five.' Or let us suppose,—if one is at liberty to make such a daring supposition,—that the appointed members were to be six Catholics and only five Protestants, would not that be quite as near to equality as the arrangement that has now been in operation for fifty-five years? [1]

I fear that from all this we must come to the conclusion that, in the mind of the learned author of the manual referred to in this Appendix, his expression '*as nearly as possible* an equal number of Protestants and Roman Catholics' means, as nearly as possible an equal number, consistently with the permanent maintenance of a Protestant majority.

As an unaccountable instance of inaccuracy in a legal writer, the following statement as to the provisions of the Act of 1844 regarding the Secretaries to the Board may be quoted here. It is from the legal manual just referred to :—

'The two Secretaries (who generally are barristers) appointed under the statute *must be*, one a member of the Irish [Protestant] Church, and the other of the Roman Catholic Church.'[2]

In a legal treatise, which distinguishes so carefully between what 'generally' occurs in point of fact, and what 'must' be done 'under the statute,' it is indeed strange to find a statement so completely inaccurate as the statement thus quoted.

The words of the statute are :—

'It shall be lawful for the Lord Lieutenant, or other Chief Governors of Ireland, with the consent and approbation of the Commissioners of Her Majesty's Treasury, from time to time to appoint *a Secretary or Secretaries* to the said Commissioners.' [3]

From this it will be seen that, so far from there being in the statute a distinct requirement as to the religion to which each of the two Secretaries is to belong, not only is there no such requirement, but it is not even prescribed that there shall be

[1] I am, of course, aware of the words of the second section of the Act of 1844 : 'five *and not more than five*, shall at all times be persons professing the Roman Catholic religion.'

But that provision has reference only to the constitution of the Board as set up by that Act of 1844. The number of appointed members then was ten, and to this number, and to this alone, the words 'five, and not more than five' refer.

This is plain from the Act itself. For, after providing that '*ten* proper and discreet persons' are to be from time to time appointed as Commissioners, it goes on to say : '*of which ten persons*, five and not more than five shall at all times be persons professing the Roman Catholic religion' (7 & 8 Vict. c. 97, s. 2).

[2] Hamilton. p. 221.

[3] 7 & 8 Vict. c. 97.

two Secretaries. Since 1844, two,—one of them a Catholic, the other a Protestant,—have always been appointed.[1]

Having been a Commissioner of Charitable Donations and Bequests for the last twenty-three years, I feel bound to guard against a possible misconception. If I complain, as I do, of the persistent maintenance of a permanent Protestant majority amongst the Commissioners appointed by the Crown, it is not that the inequality in the appointments has within my experience led to any action of the Board in the slightest degree hurtful to any Catholic interest. I am not indeed aware even of a single instance, in which the result of the consideration of a case in which Catholic interests were concerned was different from what it would have been if the case had been dealt with by the Catholic Commissioners only. Moreover, I feel quite satisfied that no such case has occurred.

But principle is principle. And, especially in view of the indefensible, and, to my mind, offensive, statements quoted in this Appendix,—statements representing the actual constitution of the Bequests Board as an embodiment of the principle of 'religious equality' 'well accomplished,'—I cannot but think that the existing state of things calls for serious protest.

APPENDIX G.[2]

THE INCREASED POWERS OF THE BEQUESTS COMMISSIONERS UNDER THE ACTS OF 1867 [3] AND 1871.[4]

The Bequests Act of 1844 has to its credit two substantial reforms,—one, the great fundamental reform effected by the substitution of the new Board of Commissioners in lieu of the old one of 1800; the other, the establishment of the provision enabling endowments for certain Catholic charitable purposes to be maintained in perpetuity without recourse to the more or less unsatisfactory method of private trusteeships. Apart from these it cannot be said that the Act of 1844 contained much that was of special advantage to Catholic charities. But by the

[1] There was but one Secretary to the Commissioners of 1800-1844. But, apart from the extravagantly costly fashion in which the work was then done (see Appendix E.), we have to remember the vast increase that has taken place in the number of charities that have now to be dealt with, as compared with the number entrusted to the Commissioners before 1844.

[2] See p. 15.

[3] 30 & 31 Vict. c. 54. [4] 34 & 35 Vict. c. 101.

establishment of the new Board of Commissioners,—divested of the one-sided character that had made it impossible for its predecessor, the Board of 1800-1844, ever to gain the general confidence of the country,—the Act of 1844 laid the foundation of a far-reaching practical reform in the administration of the law regarding charities in Ireland.

This reform was effected by the enactment of the two Acts mentioned in the title of this Appendix. These Acts conferred upon the Commissioners a considerable number of important powers which until then were vested exclusively in the Court of Chancery. One manifest result of this has, of course, been a vast saving of expense to those charged with the administration of charitable funds in Ireland, or interested in the proper administration of them.

It would be out of place here to enumerate the various powers conferred on the Bequests Commissioners by these Acts. A sufficiently detailed account of them will be found in a manual already referred to in these pages.[1]

Two of them may be mentioned as examples.

I. *The power of* cy-près *application.*[2]

The Act of 1844 conferred on the Commissioners appointed under that Act no power of *cy-près* application.[3]

Cy-près powers were first conferred on these Commissioners by the amending Act of 1867, but the powers thus conferred were confined within very narrow limits. They were, however, much extended by the second amending Act, that of 1871, which has enabled them to be exercised under the following conditions :—

1. The property to be applied *cy-près* must not exceed in amount £300, or, in the case of an annual payment, this must not exceed £30 a year ;

2. No order of the Commissioners framing a scheme for a *cy-près* application can be made before the expiration of a calendar month after public notice of the proposal to make such application has been given in such manner as the Commissioners may consider most expedient and effectual for ensuring

[1] Hamilton, pp. 215-258.

Reference may perhaps also be made to a paper on the subject in *The Irish Ecclesiastical Record* for December, 1895 (Third Series, vol. 16, n. xii. Dec., 1895, pp. 1071-1099).

[2] See On *cy-près* application, Appendix D.

[3] See, on pp. 55, 62, 78-80, 90, 91, O'Connell's repeated misrepresentation of the provisions of the Act of 1844 on this point by his unaccountable interpolation of the word 'other' in his statement of those provisions.

publicity in the districts in which the charity, if of a local character, is applicable, or amongst the persons interested therein ;

3. The notice is to contain sufficient particulars of the objects of the intended order, and is to assign a reasonable time for the lodging of objections or suggestions : these are to be received and considered by the Commissioners, who are to act in reference to them as they shall think expedient.

4. It is also provided that the Commissioners may forbear to exercise their power under this section if they think fit.

By the 7th section of the same Act, the Commissioners are empowered to proceed by petition in the Court of Chancery,—now the Chancery Division,—for the *cy-près* application of a charitable fund, irrespective of the value of the property.

This is a summary form of procedure introduced by the Charities Procedure Act, 1812,[1] and is available in certain cases connected with charities. It is made available for *cy-près* cases in the manner defined in the 7th section of the Charitable Bequests Act of 1871. This section furthermore empowers the Commissioners to submit to the Court, if they think fit to do so, a definite scheme for the application of the fund in reference to which the petition is presented.

The requirements as to the giving of public notice and so forth, are, *mutatis mutandis*, the same as in the case of a *cy-près* application made directly by the Commissioners themselves.

II. *The authorising of sales or exchanges, etc., of property devoted to charity.*

It is a principle of English law that property impressed with a charitable trust cannot be set free of that trust except by an exercise of the Chancery jurisdiction. Hence it needed the intervention of the court to authorise a sale or exchange of charity lands, no matter how advantageous such sale or exchange might be to the charity.

[1] Commonly called 'Romilly's Act,' from the name of its author, Sir Samuel Romilly, an eminent lawyer, memorable for the various legal reforms which he effected.

Romilly's Act is sometimes erroneously designated 'Lord' Romilly's (see, for instance, Hamilton, p. 157), as if its author was the famous Master of the Rolls of that name. Sir Samuel Romilly was never raised either to the Bench or to the peerage : Lord Romilly was one of his sons. Curiously enough, the Act is correctly designated 'Sir S. Romilly's' elsewhere in the work referred to.

But, in the 14th section of the Act of 1867, power is given to the Commissioners to authorise a sale, or exchange, or surrender of a lease, of any land belonging to a charity, or of any part of such land, if it can be effected 'on such terms as *to increase the income*, or as *otherwise to be advantageous to the charity*.' [1]

In such cases, the Commissioners may 'give such directions . . . for securing the due investment of the money' arising from the sale, etc., 'for the benefit of the charity, as they may think fit.' [2]

APPENDIX H.[3]

MORTMAIN, AND SO-CALLED MORTMAIN.

In English law the word Mortmain is used in two very different senses.

During the Plantagenet period, statute after statute was passed for the repression of Mortmain, and those statutes, somewhat amended, are in force to the present day. Then, centuries after the enactment of the Plantagenet statutes, there was enacted in 1736, in the reign of George II, a statute which has come to be known as 'the Georgian Mortmain Act.' But the so-called 'Mortmain' for the repression of which this Georgian statute was enacted, is something wholly different from what was aimed at in the Plantagenet legislation against Mortmain, properly so called.

It will be convenient to divide this Appendix into four sections, as follows :—

1. The Plantagenet legislation against Mortmain ;
2. The Act of 1736, known as 'the Georgian Mortmain Act' ;
3. The 16th section of the Charitable Donations and Bequests Act of 1844 ;
4. The Mortmain and Charitable Uses Acts of 1888 and 1891.

1. *The Plantagenet legislation against Mortmain.*

In England, from a very early time, the holding of lands by communities of the regular clergy,—religious 'houses,' as they were designated,—was viewed with disfavour by the feudal

[1] 30 & 31 Vict. c. 54, s. 14.
[2] Ibid.
[3] See p. 15.

lords. The lords would naturally look to the profits to be derived from the various 'incidents'[1] of feudal tenure,—reliefs, wardships, escheat, and the rest. In their eyes, then, a religious house would be amongst the least desirable of tenants; for a religious house never could be under age, never could marry, never could have an heir, never could commit felony, never could die.[2]

Lands held by religious houses were said to be held 'in mortmain.'

Of the origin of the term Mortmain, various explanations have been given. It will suffice to mention one: it is, as Coke puts it, that, in so far as the interests of the feudal lords were concerned, lands so held might as well be vested in a corpse.[3]

The legal prohibition of the vesting of lands in mortmain may be traced back at all events to the Great Charter, in the form in which it was issued in 1217, as the second Charter of Henry III.[4] Throughout subsequent reigns, prohibition followed prohibition, each successive enactment being rendered necessary by the

[1] These, as distinct from the 'services' of feudal tenure,—of which 'military' or 'knights'' service was the chief,—were various sources of emolument to the lords, such as the following:—

Relief was a payment to be made to a lord by the heir before he could take up (*relevare*) his inheritance.

Primer seisin was a right of the King, in the case of a tenant *in capite*,—that is, of one holding directly from the King,—to have possession (*seisin*) of the lands and enjoyment of the profits, until the heir had formally established his claim. Possibly as a roughly estimated average, the King used to take the 'first fruits,' that is to say, one year's profits, of the lands.

Wardship. The lord was entitled to the wardship of the heir during a minority: this included the custody of the lands without having to render any account of the profits. Wardships were marketable, and were sold at times for very considerable sums.

Ousterlemain or *livery.* The heir on coming of age, had to sue for the delivery (*livery*) of the lands to him (*ousterlemain*) by the lord: for this he had to pay a fine of half a year's profits of the lands.

Knighthood. When the heir came of age, he was bound to receive the expensive honour of knighthood, or else pay a fine to the King.

Marriage. The lord, as guardian of the heir, had the right of tendering to the heir a suitable marriage: if the heir rejected the offer, he should pay a heavy fine; if he married elsewhere without the guardian's consent, the fine was doubled. This incident of feudalism, like that of 'wardship,' was a valuable marketable commodity.

Escheat was the return of the lands to the lord, either *propter delictum tenentis*, or *propter defectum sanguinis.* The former occurred in the case of a tenant outlawed, or convicted of felony; the latter, if a tenant died without leaving an heir who could succeed according to the terms of the grant.

[2] See P. & M. i. 637.

[3] See Co. Litt. 26.

[4] See P. & M. i. 311 (5).

ingenuity of the ecclesiastics of the day and of their lawyers,[1] in devising means of frustrating the various statutes that were enacted to their detriment through the influence of the feudal lords.[2]

At length, in the reign of Richard II, in 1391, a new statute was passed which, for the time at all events, it was not found possible to evade. The statute of 1391 is memorable also on another ground, for it was this statute that extended the prohibition of mortmain to lay bodies of a permanent character. It did so on the ground that 'mayors, bailiffs, and commons, of cities, boroughs, and other towns which have *a perpetual commonalty*, and other *persons which have offices perpetual*, be as perpetual as people of religion.'[3]

The penalty under which Mortmain was prohibited was forfeiture of the lands to the feudal lord of the alienor, and he had a brief term given him for taking advantage of the forfeiture; if he failed to do so, the lord next above him in the feudal scale had a similar opportunity; and so on, up to the King, who was, in feudal theory, 'lord paramount' of all the land within the realm. Then, inasmuch as, in course of time, the rights of the intermediate, or mesne, lords gradually disappeared,[4] the right of the King alone survived. Hence it is within the prerogative of the King to grant 'licences in mortmain';[5] and such licences, —for land up to a certain specified value,—are commonly inserted in charters of incorporation.[6]

[1] For, says Coke (2 Inst. 75), 'in this they were to be commended, that they ever had of their counsel the best learned men that they could get.'

[2] Blackstone's account of the long conflict (see Blackstone, ii. 269-271), makes interesting reading, but it is, in some important respects, far from accurate.

[3] 15 Ric. II, c. 5.

[4] Mainly as a result of the famous statute *Quia Emptores*, 18 Ed. I. (A.D. 1290), c. 1.

[5] Manifestly such licences are not to be regarded as dispensations in the Mortmain Acts. What occurs in the granting of a licence in mortmain is that the King simply waives his right to the forfeiture of the lands in question.

But against this obviously correct view of the matter, cavils were raised in the reign of William III, and to put a stop to them, an Act affirming the King's right to issue such licences was passed *ad cautelam* in 1696 (7 & 8 Will. III, c. 37). This Act, as an Act only of the British Parliament, did not extend to Ireland, but a similar Act was passed by the Irish Parliament in 1792 (32 Geo. III, c. 31).

[6] Thus, to take a few familiar instances:—

The charter of incorporation of the National University of Ireland empowers the University, as a body corporate, with perpetual succession, 'to take, purchase, and hold, and also to sell, grant, exchange, demise, and otherwise dispose of, real and personal property,' with, however, the limitation that 'the University shall not at any time

2. *The so-called 'Mortmain' Act of* 1736.

So far, we have considered Mortmain, taking the word in the sense which for centuries was the only one in use. We have now to consider a so-called 'Mortmain,' to which the old term came to be applied in a totally new sense in the reign of George II.

In that reign, in the session of 1736, a statute was enacted which is commonly designated the Georgian 'Mortmain' Act.[1] But, as Sir George Jessel expressed it, in giving judgment as Master of the Rolls in an English case of some importance, the statute 9 Geo. II, c. 36 is strictly 'not at all *in pari materia* with the Mortmain Acts.[2]

The Act of 1736, as an Act only of the British Parliament did not apply to Ireland, and, if it were not for a special reason that will presently appear,[3] it need not be mentioned here.

It will suffice, then, to state, in general terms, (1) that this Georgian Act applied only to gifts for *charitable purposes*; (2) that it applied to gifts of land, of charges on land, of interests in land, or of money to be laid out in land; (3) that it made gifts of any of these *for charitable purposes* void if made *by will*; and that (4) it also made void such gifts *for charitable purposes* if made *by deed* or other instrument operating *inter vivos*, unless the deed or other instrument was executed at least *twelve months*[4] *before the death of the donor*, and unless also certain other prescribed conditions were complied with.[5]

The policy of the Georgian Act has been severely criticised.

hold real property,' in the United Kingdom, 'exceeding the annual value of £50,000 (according to the value of such property at the time of its acquisition) over and above the value of any site, buildings, and hereditaments, used and occupied for the immediate purposes of the University.'

Similar provisions occur in the charters of incorporation of the three Constituent Colleges of the University, the limit of annual value fixed in each of the three cases being £30,000.

[1] 9 Geo. II, c. 36.

[2] *Luckcraft* v. *Pridham* (1877), 6 Ch. D. 214.

[3] See pp. 26*, 27*.

[4] In one particular case, six months.

[5] But a transfer by deed was not made invalid in the case of a *bona fide* sale for a fair price, without fraud or collusion.

The Act also exempted from its operation, grants, even if made by will, to the Universities of Oxford and Cambridge, and also grants for certain specified purposes to the public schools of Eton, Winchester, and Westminster.

By subsequent Acts, the exemption was extended to grants made to the British Museum, and also to grants for certain limited classes of charitable purposes.

See Tyssen, *The Law of Charitable Bequests* (London, 1888), pp. 370-400; 569, 570.

The preamble of the Act states as the evil to be remedied by its enactment, 'improvident alienations or dispositions made *by languishing or dying persons*, or by other persons, to uses called charitable uses . . *to the disherison of their lawful heirs*.' But the provisions of the Act show that the object really aimed at was not at all what the preamble would lead one to suppose. It was an Act the real aim of which it would be by no means easy to justify if the truth about it was told. Some pretence or other had to be set up. And, apparently, the pretence that was set up in the preamble served its purpose sufficiently well.

The object really aimed at was the discouragement of gifts to charity.

The grants prohibited under the old Statutes of Mortmain were grants *to corporations, sole or aggregate*,[1] and these were prohibited without reference to the purposes—charitable or non-charitable, as these might be,—for which the grants were made. The Act of George II, on the contrary, dealt only with gifts *for charitable purposes*. These, if they were of real property, or to a certain extent, if they were of personal property, it not only prohibited, but made void,—void, absolutely, if they were made by will ; void, even if they were made *inter vivos*, unless they were made by deed, and unless also they were made twelve months before the death of the donor, and unless certain other prescribed conditions were fulfilled.

The Act, as we have seen, put forward in its preamble 'the disherison of lawful heirs,' as an evil to which it was to put an end. But it left the door widely open for the utter 'disherison of heirs,' provided only that the 'improvident alienations or dispositions' complained of in its preamble were made for any purpose other than a charitable one.

As has been well said by a legal critic of the Act :—

'Persons may make improvident dispositions,' even to the utter 'disherison of heirs,' for any 'uses' other than those called 'charitable,'—for instance, to the 'uses' of a mistress,—yet to such dispositions it appears the authors of the Act had no objection.

For the Act applies only to dispositions *to charitable uses* ; and it applies equally to *all such dispositions*, whether by 'languishing or dying persons,' or by '*other* persons' ; and it applies whether there is 'disherison of heirs' or not, and even 'if there are *no heirs* to inherit,—which clearly proves that all these expressions were introduced to disguise the real purpose of the Act, and to pass it under false pretences.'[2]

[1] See Appendix C.

[2] Finlason, *History and Effects of the Laws of Mortmain*, p. 79

In illustration of the point that the Georgian Act applied equally whether there were heirs to be disinherited or not, the author from whose criticism of the Act the foregoing passage is taken, cites a case that is simply ludicrous in its absurdity :—

'It was the case of Roger Troutbeck, an old sailor who left England in 1719, . . . acquired a large fortune in the East Indies, and returned in 1785. He made a will which ran thus :—

'"As I have no relation nor kindred alive to the best of my knowledge or belief, having outlived them all, and whereas it is natural for all men to have a regard for their native place, and where the seeds of their education were first planted ; I therefore bequeath," etc., etc.

'He then left all his property to extend the Charity School of Wapping, where he was educated when an orphan boy.

'The property, however, was all confiscated to the Crown by the order of the Court of Chancery under the Act of George II, and was spent upon the Royal Pavilion at Brighton !

'Thus the poor at Wapping were deprived of an invaluable religious endowment, and the money was expended upon a royal folly, recently pulled down.'[1]

In attempted justification of the Georgian Act, a suggestion has at times been put forward that when it was enacted, there was a serious evil to be guarded against. Charities have the singular privilege of exemption from the legal rule against perpetuities, and are thus enabled to hold in perpetuity any property validly conveyed to them. Hence, it was said, there is great danger of an undue accumulation of land in the hands of charitable societies in the absence of some check such as that imposed by the Act of 1736.

This defence of the Act was put forward, for instance, by the

[1] Finlason, pp. 85, 86.

The writer of the above passage goes on to inform us that 'after the money had all been spent by the Crown in this foolish way,' some distant relations turned up, and claimed the money as next of kin, with the result that 'an enormous litigation ensued with the Crown for its recovery.'

The claimants were relations so distant that all the advertisements that had been issued by the Court of Chancery had failed to bring them forward (Ibid. p. 86). And to resume the quotation :—

'The fact that these were relations so remote, of course, can make no difference as to the character of the Act, but on the contrary, tends to show more conclusively its unpolicy ; for surely no one can contend that a man is bound *to provide for relations he has no knowledge of*.' (Ibid.)

author of the Act, Lord Hardwicke,[1] in a judgment delivered by him as Lord Chancellor, in 1748, in *Attorney-General* v. *Day*.

In that judgment, he mentioned that one of the objects of the legislature in passing this Act, was 'to prevent the locking up of land.' And in connection with this he called attention to the title of the Act, which describes the disposition of land against which the Act was aimed, as 'the disposition of lands, *whereby the same became inalienable*.'

Undoubtedly the Act of 1736, as also the old Statutes of Mortmain properly so-called, must have acted to a considerable extent as a check upon any tendency to accumulate land unduly in the hands of charitable associations. But if it was this, rather than a spirit of hostility to the making of gifts for charity, that led to the enactment of this Georgian Act, the legislators of the time must indeed have been shortsighted if they failed to see that there was a very simple way of effecting their purpose without having recourse to the drastic legislation of 1736.

They could, for instance, have adopted the simple, straightforward course of enacting that,—subject to some reasonable provisions for the protection of the interests of charities in exceptional cases,—lands bequeathed for charities should be sold, and the proceeds of the sales given to the charities, in lieu of the lands themselves.

3. *The 16th section of the Irish Charitable Bequests Act of* 1844.

The provisions of the 16th section of the Bequests Act of 1844 are sufficiently well known in Ireland to need no explanation here.

[1] Lord Hardwicke was Lord Chancellor from 1727 to 1756.

He was the author also of the oppressive Marriage Act of 1753, which enacted that thenceforth all marriages contracted in England whether by the members of the Established Church, by Protestant dissenters, or by Catholics,—the only exceptions being the marriages of Jews, or of members of the Society of Friends,—should be *null and void*, if not solemnised *in a Protestant church*, according to *the rites of the Church of England*, and *in presence*, therefore, *of a minister of that Church* as officiating clergyman.

Thus, the children, for instance, of Catholic parents, married otherwise than in accordance with this Act were, in English law, illegitimate, and, therefore, incapable of inheriting real property, titles of nobility or of honour, and the like.

And, all but incredible as it may nowadays seem, this continued to be the state of the marriage law of England until relief was given by an Act of William IV (6 & 7 Will. IV, c. 85) in 1837!

For an interesting account of Lord Hardwicke's Marriage Act, and of its results, see Burton, *Life of Bishop Challoner*, i. 324-345.

See also Lord Campbell's *Lives of the Lord Chancellors of England*, v. 123-126.

It may, however, be pointed out that the introduction into Ireland of this fragment of the English legislation of 1736 would seem to have been due to the desire of Sir E. Sugden [1] to assimilate, to whatever degree might be found possible, the law of Ireland with that of England.

Sugden was a man of considerable political influence; and as he was Lord Chancellor of Ireland when the Charitable Donations and Bequests Bill of 1844 was being got into shape, it would be difficult, in view of his statement transcribed elsewhere,[2] to suppose that the idea of inserting some such provision as that contained in the 16th section of the Act did not emanate from him.

4. *The Mortmain and Charitable Uses Acts of* 1888 *and* 1891.

These two Acts, which it is unnecessary to consider separately, regarded England only.[3] But they furnish an excellent illustration of how matters affecting the interests of Ireland fare in the English Parliament.

As neither of these Acts applies to Ireland, their provisions need not be considered here, with the exception of one provision of the Act of 1891, which affects Ireland indirectly.

The provision thus referred to is one that completely reverses the policy of the Georgian Act of 1736 in its legislation against bequests of real property for charitable purposes.

We have seen that the Georgian Act has been sharply criticised on the ground that if the real object of its authors had been, not to discourage gifts for charitable purposes, but to hinder the withdrawal of excessive quantities of land from the ordinary course of commerce, that object could have been easily attained by legislation, without any grave injury to charities.[4]

Now this precisely,—after more than a century and a half of

[1] See p. 85, n. 2. [2] See p. 32*.

[3] It is interesting to note that in these Acts the line of distinction between Mortmain in the old and genuine sense of the word (see pp. 20*, 22*) and the so-called 'Mortmain' of the Georgian Act of 1736 (see pp. 23*, 26*), is drawn with unmistakable clearness.

In the Act of 1888, there is a Part I, headed Mortmain, and a Part II, headed Charitable Uses. In the former are comprised only those provisions that relate to the Mortmain of the Plantagenet Statutes,—all others, including those provisions that relate in particular to the Georgian 'Mortmain' Act are arranged, not under the heading Mortmain, but under that of Charitable Uses.

Throughout both Acts, this distinction is observed, the term Mortmain never being used in reference to the Act of 1736.

[4] See p. 28*.

waiting,—is what has at length been done for the benefit of charities in England by the Act of 1871.

That Act provides that land may be devised by will for the benefit of any charitable purpose, but that, subject to an exception specified in the Act, land so devised shall be sold for the benefit of the charity within a year from the death of the testator or within such extended time as may be determined (*a*) by the High Court, or (*b*) by any Judge thereof, sitting at chambers, or (*c*) by the Charity Commissioners.[1]

The exception is that either the High Court, or any of its Judges sitting in chambers, or the Charity Commission, if satisfied that the land in question is 'required for *actual occupation for the purposes of the charity*, and *not as an investment*, may sanction its retention of the land by the trustees of the charity.

We have also seen that the enactment of the 16th section of the Act of 1844 was in no small degree due to a desire to assimilate, as far as might be possible, the law of Ireland as to bequests of real property for charitable purposes, to the law of England as enacted in the Georgian 'Mortmain' Act of 1736.[2]

It might naturally, then, be expected that when that Act was to so large an extent amended on reasonable lines, the 16th section of the Irish Bequests Act of 1844 would be similarly dealt with.

But, as so frequently happens, the reform—though frankly recognised as urgently needed in England,—was not recognised as at all needed in Ireland.

And so, whilst in England a bequest of real property for charitable purposes is now valid, *no matter how brief may be the interval between the execution of the will and the testator's death*, Ireland, down to the present day, has been left without relief of any kind, under the legislation of the 16th section of the Act of 1844, with the crude time-limit of three months, fixed, as that limit was, neither upon any principle of law, nor upon any ground of common sense.

[1] The English Charity Commissioners form a body corresponding somewhat roughly to the Charitable Donations and Bequests Commissioners in Ireland, with, however, more extended powers, and with the very important difference that, whilst the Irish Commissioners are all unpaid, two of the English Commissioners are well paid, and have, in addition, a staff of thirty or forty paid officials to assist them in their work.

[2] See p. 27*.

APPENDIX I.

LEGAL PROTECTION FOR THE WIDOW AND THE ORPHAN.

It may not be out of place here to call attention to the protection that was given to widows and orphan children by the common law of England in the old Catholic times.

From the earliest times, the right of disposing of personal property by will was recognised by the law of England; but, for many centuries, the right thus recognised was subject to a large restriction. Only in one case did the right extend to the whole of the testator's personal property, and that was if he died leaving neither widow nor child.

If the deceased left a widow and children,[1] his goods, after his debts were paid, were divided into three equal parts; one of these went to his widow, another to his children, only the third part was at his own disposal; if he died a widower, with children, he could then dispose of one half, and the other half went to the children; similarly, if he died leaving a widow but no children, he could dispose of one half, and the other half went to the widow.

The shares thus secured to the widow and children were known as their *partes rationabiles*.

The *pars rationabilis*, whether of the widow or of the children, was also known as the *pars legitima*, the 'legitimate part,' and the 'legitim.' These terms are taken from the old Civil Law of Imperial Rome.[2] In the law of Scotland, in which this old provision of the Roman law is in force to the present day, the three parts into which the goods of the deceased are thus divided, are known, respectively, as 'wife's part' or *jus relictae*, 'bairns' part,' and 'dead's part,'—this last being so called because it is the part over which the dead man had the power of disposing as he willed.[3]

In England, the custom by which the *partes rationabiles* were reserved to the widow and children of the deceased was upheld much longer in the northern, than in the southern, province.[4]

Throughout the province of York, the custom was maintained down to 1692, when it was abolished by the Acts 4 Wm.

[1] Throughout this Appendix, what is said of 'children' applies equally to one child if there is but one.

[2] The Roman Civil Law doctrine of 'legitim' is stated and explained by the canonists in commenting on the 26th title (*De testamentis et ultimis voluntatibus*) of the 3rd book of the Decretals.

For an admirably clear exposition of that legal doctrine in English, see Hunter, *Exposition of Roman Law* (4th edition), pp. 780-786.

[3] As to all this, see Blackstone, ii. 492, 493; Stephen, ii. 227, 228; Holdsworth, iii. 440; P. & M. ii. 346-353.

[4] 'Provinces' are here spoken of because wills belonged to the ecclesiastical courts, that is, to the courts of the southern province of Canterbury or to those of the northern province of York.

and Mary, c. 2, explained by 2 & 3 Anne, c. 5. In the province of Canterbury, it had gone into disuse long before then: even in the reign of Elizabeth it was not being enforced in that province, except in some particular places where it was maintained by local custom, as, for instance, in Wales, and in the City of London.

Eventually statutes were enacted which provided,—in 1696 for Wales, and in 1724 for London,—that persons living within those localities might, if they wished to do so, dispose by will of the whole of their personal property.

As regards Ireland, abundant evidence of the recognition of the doctrine of 'legitim' in the ecclesiastical courts,—in those at least within the Pale,—will be found in a singularly interesting volume published by the Royal Society of Antiquaries of Ireland. The volume contains a register of wills, probate of which was granted in the Consistorial Court of Dublin in the times of two Archbishops of the see in the fifteenth century,—Michael Tregury (1449-71) and John Walton (1472-84).

In this register, prefixed to the transcript of each will, there is an inventory of the personal property of the deceased. Into this is brought a list of the debts due to the deceased, and, as a set-off, there is a list of the debts due by him. From all this a balance is struck, showing what the deceased was really worth. Then comes a statement of the *portio defuncti*, the amount that could be disposed of under the will of the deceased, after the *partes legitimae* had been set aside for the widow and the children, or for the widow only, or the children only, as the case might be.

We have seen that in England the old legal doctrine of *partes legitimae*, which were taken out of the power of the testator and secured for the benefit of his widow and children, was brought to an end only gradually, by a succession of Acts of Parliament, each of which suppressed the custom in some district where it had until then held its ground. In Ireland, the custom was put an end to throughout the whole country by one statute,[1] which was enacted by the Irish Parliament in 1695.

APPENDIX J.

SIR E. SUGDEN (LORD ST. LEONARDS) ON THE REMOVAL OF DIFFERENCES BETWEEN THE LAWS OF ENGLAND AND OF IRELAND.[2]

In reference to what has been said on the subject of this Appendix in Appendix H.,[3] it may be useful to quote a remark-

[1] 17 Will. III, c. 6. [2] See pp. 27*, 28*. [3] See ibid.

able passage from Sir E. Sugden's judgment in *The Incorporated Society* v. *Richards*.[1]

In that case the main question to be decided was whether a charitable trust impressed upon property, the legal conveyance of which to the trustee was invalid, could be upheld by the court. If the trust could be upheld, the heir-at-law, in case he stood upon his legal rights and took over the property, should take it burdened with the trust, and this would be so, even though the trust was of such a nature that the execution of it would leave the property in the hands of the heir-at-law not worth a farthing. Such a case would be, for instance, that of a property conveyed upon trust to apply the rents and profits to a charitable purpose.

In England, in such a case, the trust would undoubtedly be upheld in the Court of Chancery, and the prevailing opinion amongst the English judges would seem to have been that the jurisdiction enabling this to be done was derived from a statute of 1601,[2] known as the Statute of Charitable Uses.

If this statute really was the origin of the jurisdiction in question, a trust could not in such circumstances be upheld in Ireland, for the statute of 1601 was a statute only of the English Parliament, having therefore no force in this country, and there seemed to be no analogous statute of the Parliament of Ireland. But if the jurisdiction by virtue of which a trust such as we are considering could be upheld in England was not derived from the Statute of Charitable Uses, but was a jurisdiction inherent in the Court of Chancery, independently of any statute, such a trust could be upheld in Ireland also, for the Chancery jurisdiction in the two countries was the same.

Sir E. Sugden's judgment in *The Incorporated Society* v. *Richards* extends over fifty pages of the printed reports, and is of singular interest from many points of view.[3] In it he showed very plainly that the view of the matter generally taken in England was wrong; that the jurisdiction in question was not derived from the statute of 1601; that it was a jurisdiction inherent in the Court of Chancery, independently of any statute;

[1] 1 Dr. & War., 258.

[2] 43 Eliz. c. 4.

[3] The judgment is particularly noteworthy for Sir E. Sugden's painstaking and ingenious analysis of the Irish statute, 10 Car. I. sess. 3, c. 1, which, as it stands on the statute book,—correctly printed, though it is, from the original manuscript Parliament roll,—is not even intelligible. A previous Lord Chancellor of Ireland, Lord Manners, saying that he was 'really at a loss to know what it meant,' summarily put it out of consideration as 'a very imperfect statute' (see Hayes, p. 634.)

But Sir E. Sugden, by his painstaking analysis, showed that it was a very important statute, and to a large extent analogous to the English Statute of Charitable Uses.

and he decided, therefore, that the jurisdiction could be exercised by the Irish, as well as by the English, court.[1]

On the point mentioned in the title of this Appendix, Sir E. Sugden, towards the end of his judgment, said :—

'I consider it very desirable that the law of England and of Ireland should as much as possible stand upon the same footing, . . and if the Statute of Charles I [2] be a recognition of devises such as this, which I think is the correct reading of all the authorities, then the law of this country will stand as nearly as possible upon an equality with that of England, save so far as the law of England has been modified by the statute of 9 Geo. II, c. 36 [the Georgian Mortmain Act],[3] to which there is nothing similar in this country.

'I attempted at one time to introduce a Bill into the House of Commons similar to the 9 Geo. II, c. 36, for this country, and which had I been able to accomplish (*sic*), there would have existed no difference between the laws of the two countries upon this subject.[4] But I did not meet with any encouragement, and that only difference still subsists.' [5]

This memorable judgment was delivered on the 25th November, 1841.

APPENDIX K.

GIFTS-OVER : 'THE O'HAGAN CLAUSE.' [6]

By a 'gift-over' is meant a gift that is to take effect in the event of the failure of a prior gift for which the donor has in the first instance made provision. Thus, for instance, if *A* bequeaths £1000 to *B*, and directs that, if *B* should die before him, the legacy is to go to *C*, the gift to *C* is a gift-over.

If a testator in Ireland wishes to bequeath certain lands for a charitable purpose, but fears that the bequest may become invalid from his dying within three months of the execution of his will,[7] he will probably be advised by his solicitor to adopt the following course : (1) to devise the lands to some person or persons to hold in trust for the charity, and (2) to make a gift-over of the lands to the same or some other person or persons,—not

[1] See 1 Dr. & War., 280-333.
The same conclusion had been arrived at, and on substantially the same lines, by Sir Michael O'Loghlen, as Master of the Rolls in Ireland. It was on appeal from his decision that the case came before Sir E. Sugden as Lord Chancellor, with the result stated in the text above.

[2] 10 Car. I. sess. 3. c. 1.
[3] See Appendix H., pp. 27*, 28*.
[4] See pp. 85, 86.
[5] 1 Dr. & War., 330, 331.
[6] See p. 32, n. 3.
[7] See p. 14 (7).

in trust, but absolutely,—the gift-over to take effect in the event of the prior gift being, for any reason, invalid.

The testator in such a case will, no doubt, take care to name as devisee of the lands in the gift-over some person, who, he feels confident, will not appropriate the gift to his own use, but will apply it to the charitable purpose of the gift that has failed.[1]

A clause, commonly designated 'the O'Hagan clause,' is frequently inserted in wills of real property in Ireland as a means of saving the interests of charities in the event of a devise for charitable purposes being held invalid. The clause known by this name is in the form of a gift-over, as described in the preceding paragraphs of this Appendix.[2]

That the clause which has come to be known in Ireland as 'the O'Hagan clause' was in use in England before either of the distinguished Irish lawyers of that name had even been called to the bar, is shown by a case, *Carter* v. *Green*,[3] the essential facts of which are as follows :—

The will in question in the case was executed in 1831. It was that of a testator who bequeathed his residuary personal estate to four persons,—named, respectively, Wilson, Green, James, and Long,—upon trust, after paying his debts, and so forth, to pay the residue to the treasurer of a certain

[1] A gift-over, such as that mentioned in the text above, if not made with careful regard to legal requirements, may easily be rendered void. It would, for instance, be void if not kept, during the testator's lifetime, absolutely clear of everything in the nature of an understanding between the testator and the devisee that the gift is to be applied to a charitable purpose.

[2] The authorship of 'the O'Hagan clause' is sometimes ascribed to a distinguished Irish lawyer, Mr. Thomas O'Hagan, who was called to the Bar in 1836, became Queen's Counsel in 1849, and was promoted to the bench as one of the Judges of the Court of Common Pleas in 1865. Raised to the peerage in 1870, as Baron O'Hagan of Tullahogue, he was on two occasions Lord Chancellor of Ireland,—the first Catholic by whom that office was held since the reign of James II.

But it seems to be more generally considered that the invention of the device embodied in what is known as 'the O'Hagan clause' is due rather to the legal acumen of Mr. John O'Hagan, Q.C., a son-in-law of Lord O'Hagan. Mr. John O'Hagan was called to the bar in 1842, became Queen's Counsel in 1865, and was afterwards appointed, in 1881, the first Judge of the Court of the Land Commission.

It would, however, seem to be a mistake to ascribe any such recent origin as that indicated by the dates mentioned in the two preceding paragraphs, to the ingenious but simple device which has been, in England, as well as in Ireland, the means of saving not a few gifts for charities.

Apparently the clause came to be known as 'the O'Hagan clause,' from the fact that it was largely used by Mr. John O'Hagan in his extensive practice at the bar.

[3] 3 K. & J., 591.

charitable Association. Not very long afterwards, a doubt arose as to whether the bequest was not void under that provision of the Georgian 'Mortmain' Act [1] which made void a bequest of money for any charitable purpose involving the purchase of land,—one of the purposes of the Association in question being apparently of that nature.

A codicil was then added to the will in 1833, providing that 'if any part or parts of the will should by any law then in force be considered not to have their full operation' for the purposes for which the testator had designed them, he bequeathed all such moneys and so forth, *to the above-mentioned Wilson, Green, James, and Long,* as joint tenants, '*free from any trust or condition whatever, express or implied.*'

For some reason not indicated in the report, the case did not come before the court until 1857.[2]

The validity of the gift-over in the codicil was then disputed on behalf of the next-of-kin, reliance being placed on a decision given by Lord Northington [3] in 1764, in a case [4] in which there was a bequest for a charitable purpose, which was held to be invalid under the 'Mortmain' Act of 1762. In that case, however, a codicil had been added, to the effect that in case the law would not allow the testator's intention to be carried out, the moneys bequeathed by him were to be applied by his trustees to charitable uses as near to his intention as the law would permit.

Lord Northington declared the codicil void, as a fraud upon the 'mortmain' law.

But in *Carter* v. *Green,* Vice-Chancellor Page-Wood declined to regard Lord Northington's decision as of authority. 'It had not,' he said, 'subsequently met with approbation'; he 'could find no decision on which it had been followed.' On the other hand, he said, there were 'many cases in which there were gifts-over, made to take effect if the prior gift was found to be in fraud of any rule of law,' and so far as he was aware, 'it had never occurred' to any one 'to argue that such a gift-over was in fraud of any rule of law.'

There remained a difficulty supposed to result from the fact that the four persons to whom the absolute gift-over was made were *the same four persons* to whom the prior gift had been made in trust for the charity. As to this, the Vice-Chancellor said:—

[1] See Appendix H., pp. 23*-26*.

[2] By that time three of the four legatees named in the will and codicil had died, and Long was the sole survivor.

[3] Lord Northington held the Great Seal, as Lord Keeper, from 1757 to 1761, when he was appointed Lord Chancellor. He resigned the Chancellorship in 1767.

[4] *Attorney-General* v. *Tyndall,* 2 Eden, 207; Ambler, 614.

'That bequest is expressed by the codicil to be made to them "free from any trust or condition whatever, expressed or implied"; and, that being so, it is impossible for this Court [to convert the bequest into a bequest upon trust] unless it can convert the legatees into trustees by proof of *some communication between them and the testator*, importing *that the testator intended a trust, which they in effect undertook*.' [1]

'Here no such case is attempted to be made.'

Thus the gift-over was upheld.

APPENDIX L.[2]

O'CONNELL'S OPINION OF THE HARMLESSNESS OF THE PENAL SECTIONS OF THE CATHOLIC 'EMANCIPATION' ACT.

In several of O'Connell's letters published in W. J. Fitzpatrick's interesting collection, we find references to this subject.[3]

In one letter, O'Connell says: 'I will stake my existence that I will run a coach-and-six three times through this Act.' [4]

In another, he says: 'The clause against the Catholic Bishops taking a denomination by diocese [5] . . is one of the most foolish and most abortive clauses ever invented. The clause against the Monastic Orders is equally so; I would ride a troop of horse three times through it. You will observe that no person belonging to these Orders can be prosecuted before a magistrate, or by any private person. The prosecution must be in the Court of Exchequer only, and by the Attorney-General alone.' [6]

The following letter is worth transcribing at length [7]:—

(Confidential.)

'19, Bury Street, St. James's,

'18*th March*, 1829.

'Rev. and Dear Sir,

'I am standing counsel for the friars, so that you owe me no apology nor any thanks, for attending to any affair of yours.

[1] 3 K. & J. 602, 603. [2] See p. 45.

[3] *Correspondence of Daniel O'Connell.* Edited by W. J. Fitzpatrick. (London, 1888.)

[4] Ibid., i. 174.

[5] The Act in its 24th section enacted, in effect, that no Catholic archbishop, bishop, or dean should use the title of 'archbishop of any province, bishop of any bishopric, or dean of any deanery, in England or Ireland,' under a penalty of £100 for each offence.

[6] *Correspondence of Daniel O'Connell*, i. 179.

[7] Ibid., 177.

My fee is paid by one moment of recollection of me occasionally in the Holy Sacrifice.

'I have the happiness to tell you the proposed law is one which has been well described by the celebrated jurist Bentham, in one word, *unexecutable*,—that is, that can never be executed.

'This is literally one of those laws. It is insolent enough in its pretensions. It will be, and must be, *totally inefficient in practice*; for these reasons:—

'1st. There is no power at all given to magistrates to interfere in this subject; nor any jurisdiction whatsoever given to magistrates in that respect.

'2ndly. No private person can prosecute any friar or monk; nobody can do it but the Attorney-General, so that you are thus free from private malice.

'3rdly. The person prosecuted—that is, if any friar or monk be prosecuted—is not bound to disclose anything; or to say one word, but simply to allow his attorney to say *nil debet* to the information.

'Thus, you see, nobody will be obliged to accuse himself. This will put the prosecutor on his proofs.

'Now, fourthly, the prosecutor will have nobody to prove his case, because, mark, there is a penalty on all persons assisting at the taking of the vows; therefore, if any of these persons be examined as witnesses, they can, with perfect safety, object to give evidence, and totally refuse lest they should convict themselves.

'Thus you see that it is almost impossible any prosecution should be instituted at all; and it is quite impossible that any prosecution should be successful.

'Besides, the existing class of friars are all legalised. . . . Go on with your building and prosper. Be so good as to put down my name for £50. I will give it to you when I arrive in Cork.

'Regretting I cannot afford to give more, I have, etc.,

'DANIEL O'CONNELL.

'*To*

'THE REV. W. A. O'MEARA, O.S.F.'

In another letter, O'Connell assures a correspondent that 'The Emancipation Bill is an excellent one in every respect,—aye, in every respect.'[1]

From all this it is plain that O'Connell adverted only to

[1] *Correspondence of Daniel O'Connell*, i. 178.

direct results of the Act in rendering the members of the prohibited Orders liable to fine, imprisonment, and banishment.

He assumed, and not without good reason, that those penalties never would be inflicted. But he seems to have altogether overlooked the fact that inasmuch as the Act prohibited those Orders, it made them illegal, and thus made it impossible for a Court of Equity to uphold bequests or trusts of any kind in their favour.

APPENDIX M.

PROTEST OF SIR ANDREW M. PORTER, AS MASTER OF THE ROLLS IN IRELAND, AGAINST THE CONTINUED MAINTENANCE ON THE STATUTE-BOOK OF THE PENAL SECTIONS OF THE ACT OF 1829.

The following extract from the judgment of Sir A. M. Porter in *Roche* v. *MacDermott*,[1] gives striking expression to the view strongly held by that eminent Judge, and often expressed by him from the bench, in protest against the maintenance of the penal clauses of the Act of 1829 upon the statute-book.

The point to be decided in *Roche* v. *MacDermott* was as to the validity or invalidity of a bequest of £500 'to the Rector of the Jesuit College at Mungret, in the County of Limerick, in aid of the school there for the training of pupils intended for the Church.'

The bequest was impugned as being of benefit to the Jesuits and therefore void under the penal sections of the Act of 1829.

Sir Andrew Porter, however, declined to take this view. He held that the bequest as shown by the evidence before him, was not of either pecuniary or other benefit to the Jesuits, directly or indirectly. But in his judgment he took occasion to express, by no means for the first time, the strong opinion which he held about the maintenance on the statute-book, unrepealed, of the provisions under which it had been sought to have the bequest set aside :—

'I have very often said that it appears to me to be a crying injustice that a system of law depending upon religious disabilities should be enforced in this branch of the Courts [2] in reference to property, and used as an engine for the purpose of defeating the otherwise lawful intentions of testators, when it was not directly intended for that purpose, and when the enactments themselves have been allowed to become a dead letter for the last eighty-two years.[3]

'It is said that this college at Mungret is illegal ; that the

[1] [1901] 1 I.R. 394. [2] The reference is to the Chancery Division.
[3] This judgment was delivered in 1901.

institutions of the Jesuits are illegal; that the members of it are liable to indictment for misdemeanour by reason of their very existence in this country. Though no statesman or public person dreams of putting this law into force directly, and in the only way specifically contemplated, it is left to the Judges of the Chancery Division to apply and enforce it in relation to questions of property, and questions of charities otherwise perfectly legal and praiseworthy, and thus indirectly to enforce a law which never is, and can never be, directly enforced.' [1]

In concluding his judgment, in which, as already stated, he upheld as valid the bequest before him, the Master of the Rolls remarked that he did so not from any other motive than that it was clear from the evidence in the case that the bequest was in no sense one for the benefit of the Jesuit Society or of any other Order prohibited by the Act of 1829.[2] If this were not so, he would, of course, have been obliged to apply the law as it stood, and set aside the bequest as void.

APPENDIX N.

O'CONNELL'S EVIDENCE GIVEN BEFORE THE LORDS' COMMITTEE OF 1825 IN FAVOUR OF THE STATE-PAYMENT OF THE IRISH CLERGY.[3]

In the course of O'Connell's evidence given before the Committee of the House of Lords on the State of Ireland, in 1825, the following remarkable passages occur:—

'*Q*. Do you conceive it possible for any proposition for the payment of the Roman Catholic clergy to be acceptable, either to the clergy or the laity, independently of the question of emancipation?

'*A*. Without emancipation, it will certainly be rejected. It would not be entertained for a moment without emancipation.

'*Q*. Your opinion is that, coupled with emancipation, it would be accepted by the Catholic clergy?

'*A*. My opinion is that, *coupled with or following emancipation, it would be acceptable*, but not preceding it; and *my humble opinion is that it would be a most desirable thing* to have that species of settlement take place after emancipation.'

And again:—

'*Q*. Can you form any opinion whether the Roman Catholic clergy of Ireland would be disinclined to accept of a provision from the State, if in doing so they were freed from all imputation of making a separate cause from that of the laity?

[1] [1910] 1 I.R. 401, 402. [2] Ibid., 402. [3] See p. 54, n. 1.

'*A.* I am convinced they would not accept it at all till the Catholics were emancipated, . . . but I am sure that if an equalisation of civil rights took place, they would accept of it, and that the Catholic gentry would concur with them in a desire that they should; the object being *to connect the Catholic clergy and laity of Ireland with the government itself*, to embody them as it were, as a portion of the State, *and to give the government what we would desire, a reasonable and fair influence over the Catholic clergy*. . . .

'*Q.* Do you not believe that the Roman Catholics of Ireland, both clergy and laity, would be willing to afford to the government of the country reasonable security for the domestic education of their priesthood, and that there should not be persons appointed from their establishments abroad ?

'*A. I am quite convinced of it.* I beg to say that I am thoroughly convinced that the object of the Catholic clergy and laity of Ireland is sincerely and honestly *to concur with the government in every measure that shall increase the strength of the government in Ireland* so as *to consolidate Ireland with England completely*, and in every beneficial aspect; I am quite convinced of that. . . They would very heartily concur that *no person should be nominated to any situation in the Catholic Church of Ireland who was not substantially educated, as well as born, in allegiance, and in Ireland* (!).

APPENDIX O.

LETTERS OF IRISH BISHOPS ENCOURAGING THE OPPOSITION TO THE BEQUESTS ACT.[1]

It was suggested by O'Connell at the first of his meetings of protest against the Bequests Act that a resolution should be passed at the next meeting calling upon the Irish Bishops to assemble again in general meeting, and condemn the Act.

It seems, however, to have been felt both by O'Connell himself and by others who were actually engaged in the agitation against the Act, that such a resolution would be much more effective if passed by a body more representative of the opinion of the citizens at large than a merely parochial or district meeting could be supposed to be.

The further consideration of the matter was then postponed until the various meetings in the city had been held; and on the 17th of the following month of January, a meeting of the chairmen, secretaries, and movers and seconders of the various

[1] See p. 90.

resolutions at the parochial meetings was held in the Royal Exchange,—now the City Hall,—to decide upon the course of action to be taken.

It was resolved to adjourn the meeting for a few days, to allow of an address being prepared, which, if approved at the adjourned meeting, could be signed by all present, and sent to each Bishop.

At the adjourned meeting, held on the 20th of the month, the draft address, which had previously been submitted to O'Connell, and had been approved by him, received the approval of the meeting. It practically summed up the resolutions passed at the various meetings that had been held in the city, illustrated in detail by the chief reasons advanced by O'Connell as grounds of opposition to the Act.[1]

The meeting did not separate without passing the following resolution of confidence in O'Connell :—

'Resolved.—That we cannot separate without giving expression to our feelings of heartfelt gratitude to, and unbounded confidence in, our illustrious countryman, Daniel O'Connell, the Liberator of Catholic Ireland, not alone for his splendid achievement of religious freedom, not alone for his indefatigable exertions at all times in the cause of our country, but *last, best, and holiest of all*, for having co-operated with the majority of the hierarchy and second order of the clergy for defeating (for confidence will not now be placed in it) a wily, plausible, and insidious Act, which infallibly places in the hands of a Protestant Minister the power of either *confiscating all Catholic property bequeathed in charity* (!) or of *subverting the independence of the Catholic Church* (!).'

The address, duly signed, was then forwarded to the Bishops, from sixteen of whom replies, addressed to the honorary secretary of the meeting, were received. These were published, at intervals as they were received, in the newspapers of the day.[2] Perhaps the most interesting feature of these replies was the unreserved manner in which some of the writers expressed their views upon various ecclesiastical matters, in letters such as these, addressed to a worthy lay citizen of Dublin, with whom, in all probability, none of them had even the slightest personal acquaintance.

The replies were by no means unanimous. One expressed the

[1] The address is given in full in *The Freeman's Journal* of January 23rd, and *The Pilot* of January 25th, 1845, and also in *The Catholic Directory* for 1846, pp. 404-407.

[2] They will be found, republished, in *The Catholic Directory* for 1846, at pp. 408-418.

The originals, which eventually passed into the hands of the writer of these pages, are now preserved in the Dublin Diocesan Archives.

readiness of the writer to co-operate in labouring for the repeal of the unjust and impolitic disabilities which affect the regular clergy.' 'But,' he added, 'I must say that I cannot see how their condition is altered by the Bequests Bill.' [1] Another considered that it would not be expedient just then to hold the meeting of the prelates suggested in the address.

Another wrote that, whilst he admired the motives by which the signatories to the address were actuated, he had to 'remind them, with the most kindly feelings, that the Catholic Primate of all Ireland is the only competent authority to convoke a national assembly of the prelates.' Another expressed great doubts as to the necessity of such a meeting at that time. The Bishop of Killaloe, who, as we have seen, was held by O'Connell in such high esteem,[2] wrote plainly that the suggested meeting of the Bishops 'could effect no good.'

But nearly all of the sixteen replies,—all of them, indeed, with the exception of two or three,—were strongly denunciatory of the new Act. It was a 'nefarious' Act; its 'principles' were 'anti-Catholic,' and its 'tendencies' 'mischievous': it gave sanction to a 'sacrilegious usurpation of the jurisdiction and canonical rights of the episcopal office'; and so on.

We have already seen the letter of the Bishop of Meath.[3]

The Archbishop of Tuam, considered a meeting 'of the prelates desirable, if not absolutely necessary;' but he went on to say that the necessity of a meeting 'would be spared by the three episcopal commissioners resigning an office' which had already 'excited such general dissatisfaction,' and which they had 'undertaken in opposition to the well-known and recorded [4] sentiments of the great body of their brethren, regarding the uncanonical and penal provisions of that Bill.'

His Grace, continuing, said that he had entertained a hope that, on various grounds which he mentioned, 'the three venerated prelates would have been induced to resign an office which cannot be viewed but with alarm and distrust, and restore themselves again to the confidence of the Catholic bishops, the clergy, and the people of Ireland. 'I am still not,' he added, 'without the same hope,—otherwise I shall concur in the opinion of the immediate necessity of a general meeting of the prelates.'

One would think that no such resolution as that of the preceding month of November [5] had ever been passed.

[1] See pp. 94, 101, 126.
[2] See p. 72. [3] See p. 90.
[4] But see the Resolution quoted on p. 33.
[5] See ibid.

APPENDIX P.

THE SERJEANTS-AT-LAW, ENGLISH AND IRISH.[1]

In view of the references in sections XXXI and XXXII to Serjeant Shee [2] and his pamphlet, it may be advisable to call attention to the notable difference between the serjeantship-at-law in England and in Ireland.

It is known to every reader of the newspaper reports of proceedings in the Irish law-courts that, amongst the lawyers practising in those courts, there are three who are designated serjeants, and that the position of serjeant,—or, more explicitly, serjeant-at-law,—is one of distinction.

In England, until rather recent times, the serjeants were a comparatively numerous body, the members of which were appointed by the Crown, on the nomination of the Lord Chancellor. They enjoyed special privileges.

Thus they originally had the right of precedence, or preaudience, in court,—a right which was gradually undermined by the appointment of King's Counsel. In the Court of Common Pleas they alone had the right of audience; of this right, however, they were deprived by statute in 1846.

But the most honourable of their rights was, that the Judges of the Court of King's Bench and Common Pleas, and the Chief Baron, if not all the Barons of the Exchequer, were invariably chosen from amongst the serjeants.[3]

In England, serjeants-at-law are now no longer appointed.[4]

In Ireland, there was not at any time a body corresponding to the English serjeants. In this country, there was at first but one serjeant; in course of time, a second was added; and finally a third.

[1] See p. 124.

[2] Serjeant Shee was at one time a prominent figure in Irish politics. See Sir C. Gavan Duffy's *League of the North and South*, and his *Life in Two Hemispheres*.

[3] If one who was not a serjeant was to be appointed to one of the judgeships mentioned, the difficulty was got over by his being appointed serjeant before his appointment to the judgeship. This, of course, was an evasion of the rule.

The Judicature Act of 1873 provided that no person thenceforth appointed to a judgeship should be required to take, or to have taken, 'the degree of Serjeant-at-law.'

[4] On the English serjeants-at-law, see Serjeant Pullings' interesting work, *The Order of the Coif* (London, 1884).

The 'coif' was a close fitting white head-dress at one time worn by the serjeants. It was eventually reduced to a peculiar patch on the wigs of serjeants.

Serjeant Pullings, the historian of the Order, was its last surviving member. He died in 1895.

The first appointment seems to have been that of Simon Fitz-Richard, who was appointed 'King's Serjeant' in 1326. In 1627, when a second serjeant was appointed, the title of 'King's Serjeant' was exchanged for that of 'Prime Serjeant,' a title frequently met with in works on the Irish Parliament, as, for instance, Sir Jonah Barrington's *Rise and Fall of the Irish Nation.*

In 1805, the office of Prime Serjeant [1] was abolished. Thenceforward, the three Serjeants in Ireland were known as First, Second, and Third Serjeant, respectively In the order of precedence, the First Serjeant ranked after the Attorney-General and Solicitor-General.

APPENDIX Q.

O'CONNELL, DR. MURRAY, AND THE CANONS OF THE CATHOLIC CHURCH.

Before many months of 1845 had passed, the formidable agitation so skilfully engineered by O'Connell in opposition to the Bequests Act had collapsed, and its collapse was complete.

This was the inevitable result of his failure to make good his repeated undertaking to prove that, by the operation of the Act, the regular clergy in Ireland would be plundered of their property. And as the impending 'plunder of the friars' was the point upon which he had practically staked his case against the Act, his abandonment of this point, without even an attempt to defend it, made it necessary for him to withdraw from the campaign on which he had so unwisely entered.

The only other point upon which he had at any time placed much reliance was what he regarded as the antagonism between the 6th section of the Act and the canonical rights of the diocesan Bishops throughout the country. This, however, had never held a very important place in the statement of the case, either by O'Connell himself or by his followers. And any importance that it might at any time have had, it lost through the adoption by the Commissioners of the working rule by which

[1] The Prime Serjeant had precedence even over the Attorney-General: the Second and Third Serjeants had precedence over all other barristers except the Attorney-General and the Solicitor-General.

the matters in question were left to be determined in each case by the diocesan Bishop.[1]

As the year 1845 went on, an incident occurred which brought this point again to the front. Thanks, however, to the watchfulness of Dr. Murray, it failed to lead to a renewal of the agitation. Still it is worth mentioning here.

In his speech at the weekly meeting of the Repeal Association on the 21st of July, 1845, O'Connell quoted the following extract from *The Times* report of the proceedings of the House of Commons on the preceding Friday :—

'The Earl of Arundel and Surrey asked whether it was the intention of Her Majesty's Government to propose any amendment in the Charitable Bequests Bill ?

'Sir James Graham [the Home Secretary] replied that the Lord Lieutenant had received representations from the Roman Catholic Commissioners of the Board of Bequests, stating that the duty had devolved upon them of determining who the ecclesiastics were who, in certain districts, were entitled to the benefit of the bequests left to the clergy of the Church of Rome, and stating also, *that it was at variance with the canons of their Church*, which required that all matters of doctrine and discipline of this nature *should be settled by their diocesans alone*.'

It was obvious that there was a mistake somewhere. Amongst the very first of the objections urged by O'Connell against the Act was that mentioned in Sir James Graham's answer,—namely, that the provision in the 6th section of the Act, for ascertaining who is entitled to the benefit of a bequest left to the holder of a named position in the Catholic Church in Ireland, was at variance with the canons. That objection had been fully considered by the three Bishops now in question. They had found that it was groundless. But that was not all. They had become Commissioners under the Act. They were still acting as Commissioners. That three Bishops who were acting as Commissioners under the Act could themselves have stigmatised as at variance with the canons of the Church the powers under which they were acting, and were continuing to act, was surely incredible.

The most natural, and, as we shall see, the true explanation

[1] That the arrangement so made by the Commissioners would be even more satisfactory than it is, if it received legislative sanction by being embodied in an Act of Parliament, hardly needs to be stated. But it is one thing to say that a satisfactory arrangement might be more satisfactory than it is, and quite another thing to maintain, as O'Connell did, that the arrangement was uncanonical.

of the matter, was that the Bishops who were Commissioners were anxious that an effort should be made to meet, as far as possible, the views of all their episcopal brethren ; that, on this account, and, indeed, on other grounds as well, they considered it desirable that the working arrangement which had been adopted by the Commissioners should, if possible, receive legislative sanction by being embodied in an Act of Parliament ; that they had informally made their views on this point known to the Lord Lieutenant ; and that, in doing so, they had referred to the difficulty raised by O'Connell,—a difficulty which had been felt even by some Bishops,—that the powers vested in the Commissioners by the Act were in some unexplained way in conflict with the canonical rights of diocesan Bishops throughout the country.

But O'Connell could not be expected to make any special effort to find out what had really occurred. All that concerned him was that he found it officially stated in Parliament by a Minister of the Crown that the three Catholic Bishops who had become Commissioners under the Bequests Act in disregard of his warning against the uncanonical nature of their action in doing so, had now come to see that by becoming Commissioners they had involved themselves in an uncanonical course of action. Shutting his eyes,—not perhaps altogether unnaturally,—to the extreme unlikeliness of the situation set forth in Sir James Graham's statement, O'Connell did not conceal the delight that he felt in the confirmation which he assumed had now been given to his view of the Act.

Having quoted, then, *The Times* report of Sir James Graham's statement, he went on to say :—

'Oh, I feel my heart at ease, and my mind tranquil.

'I was accused, and assailed, and abused, for offering my humble opinion, that that Bill was uncanonical and inconsistent with the canons of the Catholic Church. They laughed at me for giving that opinion, poor theologian (!) as I am ; but, humble as my opinion is, here it is confirmed by those venerable characters themselves, the Most Reverend and always-esteemed Doctor Murray, the Most Reverend Doctor Crolly, and the Right Reverend Doctor Denvir.

'*I have their authority that the Bill gave uncanonical power to the Catholic prelates.* . . .

'I need not, I am sure, express the hope *that the Catholic prelates will see what course they should now take* (!), and that they will *not permit themselves to be committed*

any longer to the exercise of an uncanonical power ' (!) (hear, hear).[1]

When the report of O'Connell's speech appeared, Dr. Murray happened to be absent from Dublin on ecclesiastical business. Immediately on his return, he addressed O'Connell in a public letter, assuring him that he must have been misled by relying on some very inaccurate report of Sir James Graham's statement.

Then, after some characteristically courteous remarks, expressive of the regret which he felt at finding himself called upon to contradict before the public an assertion which O'Connell had thought it right to make, he pointed out that the prominence with which O'Connell had put his name forward in the statement at the meeting of the Association, made it his duty to speak for the prelates mentioned. That statement, he went on to say, cast ' a grievous censure ' upon those whom O'Connell surely would be ' most unwilling to defame,'—as, of course, it did, for it charged them with continuing in the discharge of duties that were ' at variance with the canons of the Church.'

' Permit me, then,' the Archbishop continued, ' most respectfully to assure you that you have not the authority of the prelates in question to sustain your assertion. They have never said, or hinted, or thought, that the Bequests Act gave them an uncanonical power.

' The speech, therefore, on which you relied must have been inaccurately reported, and the Minister must have alluded to objections which had been urged by the opponents of the Act,—objections which, in the opinion of those prelates [the three Commissioners to whom the statement referred], had no solid foundation to rest upon, but which they thought it right to bring under the notice of the Government, in the hope that every pretext, how groundless soever, for the repetition of them, would be met by a suitable remedy and taken away. . .

' With respect to the hope expressed in the subsequent part of your speech, " that the Catholic prelates will see what course they should now take, and that they will not permit themselves to be committed any longer to the exercise of uncanonical power," I have only to repeat, that they have not committed themselves to the exercise of any such power.

' And I beg further to assure you, that it is their fixed determination to persevere, with the blessing of God, so long as the multiplied duties of their station will permit, in that

[1] See *The Freeman's Journal* of July 22nd, 1845, and *The Pilot* of the following day.

charitable course on which, at a great sacrifice of time and personal inconvenience, they have, as members of the Charitable Bequests Board, deliberately entered, with the sole view of serving the poor, and of protecting, if necessary, the interests of the Church.

'I have the honour to remain, with respectful esteem,

'My dear Mr. O'Connell,

'Very sincerely yours,

'✠ D. Murray.'

BROWNE
—AND—
NOLAN
LIMITED
DUBLIN